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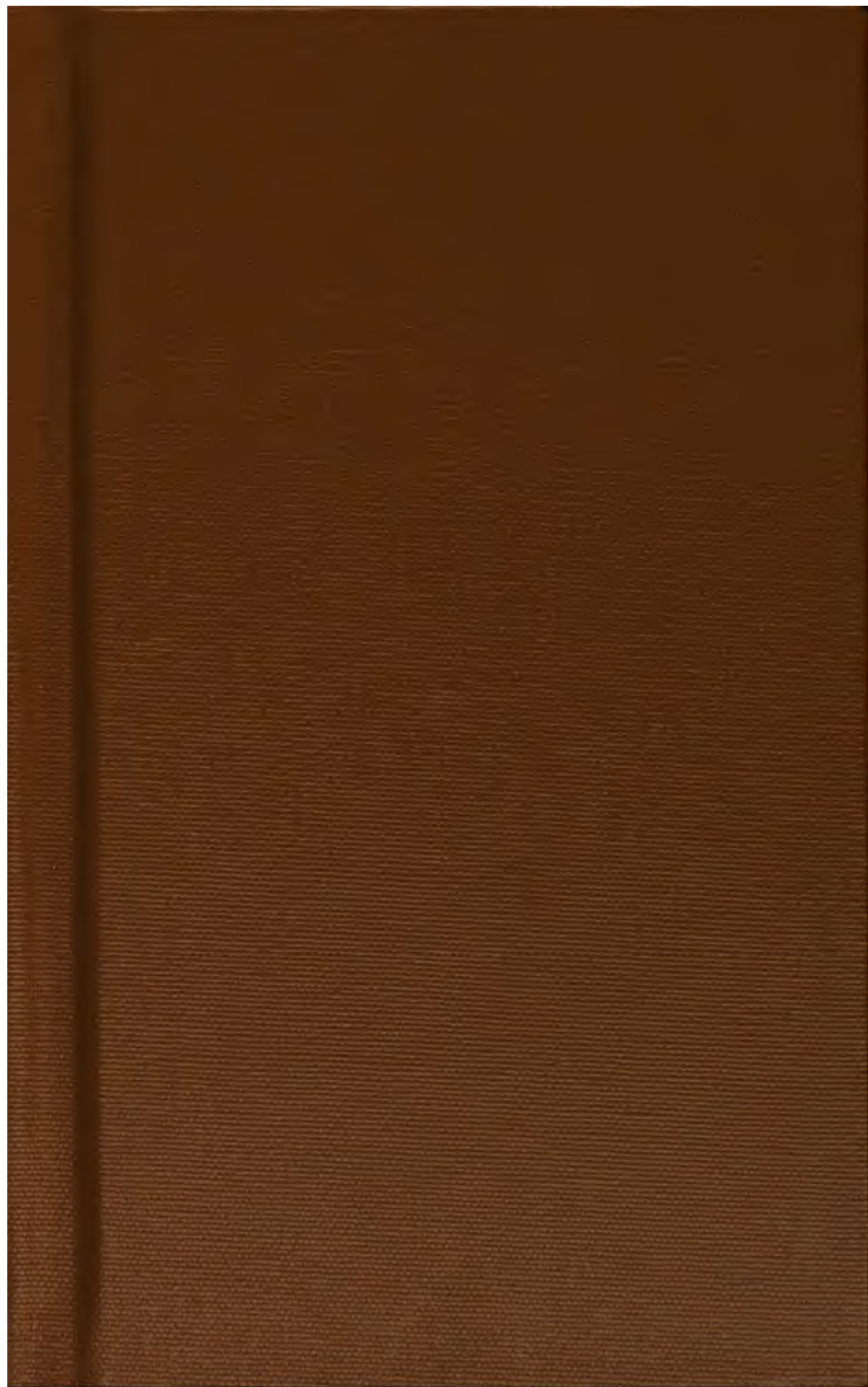
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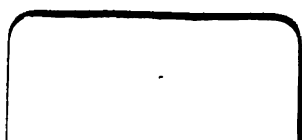
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FELLOW-SERVANTS.

A TREATISE
ON
THE LAW
OF
FELLOW-SERVANTS.

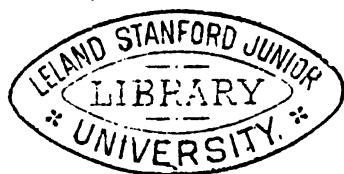
EMBRACING

**A COLLECTION OF STATUTES, ENGLISH AND AMERICAN
CHANGING OR ABROGATING THE COMMON LAW
RULE, TOGETHER WITH AN APPENDIX
RELATING TO EMPLOYES' IN-
SURANCE SOCIETIES.**

BY
WILLIAM M. MCKINNEY.

**ASSOCIATE EDITOR AMERICAN AND ENGLISH RAILROAD CASES AND AMERICAN
AND ENGLISH CORPORATION CASES.**

NORTHPORT, LONG ISLAND, N. Y.
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TO
JAMES COCKCROFT,
TO WHOM
THE LEGAL PROFESSION IS INDEBTED
FOR THE
CONCEPTION AND EXECUTION OF THE
MOST USEFUL, MOST PRACTICAL
AND MOST INGENIOUS ENTERPRISE
EVER UNDERTAKEN
IN LEGAL LITERATURE,
THIS WORK,
IN REMEMBRANCE OF MANY KINDNESSES,
IS INSCRIBED.

PREFACE.

During the half century which has elapsed since Lord Abinger decided *Priestly v. Fowler*, the courts governed by the common law have been constantly affirming, limiting or applying the rule there laid down, viz: that a master is not liable to one of his servants for an injury occurring through the negligence of a fellow-servant. An experience of several years in editing and annotating decisions for the American and English Railroad Cases had convinced the author that there was an undue and unnecessary confusion among the decided cases; that many of the courts failed very often to grasp the true principle of law underlying the doctrine. The present work is an effort to bring some order out of this chaos, to harmonize the authorities as far as possible, and to lay down certain rules by which all cases can be determined. The author has, he believes, collected and cited every decision, English and American, bearing upon the subject. Owing to the nature of the subject it has been thought advisable to give an abundance of illustration, especially upon points that are much disputed. As the subject is regulated by statutes in a number of states and in England, these acts have been set out in full along with whatever construction has been placed upon them by the courts.

Much might be said upon the question whether the common law doctrine of co-service is either just or politic in view of the immense strides which all industries and labor employing enterprises, and especially railways, have made since the doctrine was first enunciated. This, however, is a question solely for the legislature and has been thought to be out of place in a work stating the law as it is. It has, however, been made the subject of several pamphlets by well known writers.

The latter portion of the work, the appendix, is devoted to

the subject, "Employes' Mutual Insurance Societies." The great usefulness and rapidly increasing popularity of these societies fully warrants the attention given them. The rules and regulations of the best known and most prosperous of these societies are given without abridgment. They will show the methods used in conducting an institution which every large employer of labor ought to introduce among his employes.

WILLIAM M. MCKINNEY.

NORTHPORT, L. I.,
December, 1889.

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- Whalen v. Centenary Church*, 62 Mo. 326; 64, *n.* 1; 73, *n.* 1; 74, *n.* 1.
- *v. Chicago, etc., R. Co.*, (Iowa,

- 1888), 39 N. W. Rep. 894; 235, n. 5.
- White v. Kennon (Ga. 1889), 9 S. E. Rep. 1082; 284, n. 2.
- Whitman v. Wisconsin, etc., R. Co., 58 Wis. 408; 12 Am. & Eng. R. Cas. 214; 275, n. 5; 278, n. 4.
- Whittaker v. Delaware, etc., Co., 3 N. Y. Sup. Ct. 576; 86, n. 3.
- Wiggett v. Fox, 11 Exch. 832; 23, n. 1; 31, n. 1; 42, § 17.
- Wigmore v. Jay, 5 Exch. Rep. 354; 94, n. 1; 160, n. 3.
- Wm. F. Babcock, The, 31 Fed. Rep. 418; 319, n. 2.
- Willis v. Oregon R. & N. Co., 11 Ore. 257; 17 Am. & Eng. R. Cas. 539; 19, n. 1; 77, n. 1; 287, n. 2, 291, n. 2.
- Wilson v. Dunreath, etc., Co., (Iowa 1889) 42 N. W. Rep. 360; 68, n. 1.
- v. Madison, etc., R. Co., 18 Ind. 226; 127, n. 2; 267, n. 4; 268, n. 1; 275, n. 5; 278, n. 4, n. 5; 281, n. 2.
- v. Merry, 1 L. R. H. L. Sc. App. Cas. 326; 92, § 34; 94, n. 1; 113, n. 1; 160, n. 3; 213, n. 2; 268, n. 1; 278, n. 5; 321, n. 1.
- v. Willimantic Linen Co., 50 Conn. 433; 47 Am. Rep. 653; 124, § 48; 323, n. 1.
- Winbourne's Case, 30 Fed. Rep. 167; 33, n. 3.
- Wolcott v. Studebaker, 34 Fed. Rep. 8; 329, n. 1.
- Wonder v. Baltimore & O. R. Co., 32 Md. 411; 3 Am. Rep. 143; 19, n. 1; 59, n. 1; 97, n. 1; 169, n. 5; 200, n. 2; 270, n. 2.
- Woodley v. Metropolitan R. Co., 2 Exch. Div. 284; 38, n. 2.
- Wright v. London & N. W. R. Co., L. R. 1 Q. B. Div. 252; 45 L. J. Q. B. Div. 570; 49, § 19.
- v. New York Cent. R. Co. 25 N. Y. 562; 62, n. 1; 101, n. 2; 139, n. 2; 169, n. 5; 182, n. 1; 183, n. 1; 268, n. 1; 278, n. 5; 287, n. 2.
- v. New York, etc., R. Co., 28 Barb. (N. Y.), 80; 199, n. 1.
- v. Roxburgh, 2 Ct. Sess. Cas. (4th series), 748; 23, n. 1.
- Yager v. Receivers, 4 Hughes (U. S.), 192; 270, n. 1; 287, n. 2; 328, n. 5.
- Yates v. McCullough Iron Co., (Md.), 16 Atl. Rep. 280; 19 Md. L. J. 837; 97, n. 1; 324, n. 1.
- Youll v. Sioux City, etc., R. Co., 66 Iowa 346; 21 Am. & Eng. R. Cas. 589; 267, n. 2.
- Young v. New York, etc., R. Co., 30 Barb. (N. Y.), 229; 29, n. 1; 40, n. 1.
- Zeigler v. Danbury & N. R. Co., 52 Conn. 543; 29, n. 1; 45, n. 2.
- Zeigler v. Day, 123 Mass. 152; 33, n. 2; 113, n. 1; 287, n. 2.

FELLOW SERVANTS.

CHAPTER I.

INTRODUCTORY—GENERAL RULE—ITS ORIGIN and HISTORY.

- § 1. Every one is Liable for his own wrongs.
- 2. Master's Liability for Servants' Torts. *Respondet Superior*.
- 3. Fellow Servant Rule not an Exception.
- 4. Origin of Fellow Servant Rule—*Priestly v. Fowler*.
- 5. *Hutchinson v. York, New Castle & Berwick R.*
- 6. *Murray v. South Carolina R. Co.*
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- 8. Rule in other Countries.
- 9. General Statement of the Rule.
- 10. Reasons for the Rule.
- 11. Responsibility of Servant for injury to Fellow Servant.

§ 1. Everyone is liable for his own wrongs.—

It is a familiar and primary rule of law that a man is responsible for his own acts, and not for those of others. A man, as a rule, is no more liable for the wrongs done by another than he is for his debts;¹ but whoever com-

1. "It is somehow supposed that as a matter of natural right, something that exists in the nature of things, employers are liable for the injuries occasioned by their servant's negligence, and that to except fellow-servants from this rule is unjust and unreasonable. Now, this is an entire mistake, and it is really wonderful how, not only those who are not lawyers, but lawyers who ought to know better, are under the impression I have mentioned." Letter of Lord Bramwell to Sir H. Jackson. (Bevens Employer's Liability Act, 1880, p. 121.)

mits a wrong is liable for it himself. It is no excuse that he was acting as an agent or servant, on behalf and for the benefit of another. Under certain conditions, however, responsibility goes further. A man subject to a positive duty is held liable for failure to perform it. The absolute character of the duty being once established, the question is not by whose hand an unsuccessful attempt was made, whether that of the party himself, of his servant or of an independent contractor. The question is whether the duty has been adequately performed or not. If it has, there is nothing more to be considered, and liability, if any, must be sought in some other quarter. If not, the non-performance in itself, not the causes or conditions of non-performance, is the ground of liability. Special duties created by statute, as conditions, attached to the grant of exceptional rights or otherwise, afford the chief examples of this kind. Here the liability attaches, irrespective of any question of agency or personal negligence, if and when the conditions imposed by the legislature are not satisfied.¹

§ 2. Master's Liability for Servants' Torts—Respondeat Superior.

To the rule above stated there is an exception which has become so thoroughly established that it is now scarcely considered as an exception, but rather as a fundamental rule itself. This is the doctrine of *Respondeat superior*, crystallized into the maxim "*Qui facit per alium facit per se*." It has been said that this doctrine is "founded in natural justice, and is well recognized and as indisputable as Kepler's Law of Areas, or the axiom of geometry that a straight line is the shortest distance between two points."² The rule may be stated thus: The master is liable for the wrongful and negligent acts of his

1. Pollock on Torts p. 63.

2. 14 Mass., Rep., Labor, Stats., p. 6.

servant, performed while engaged in the pursuit of the master's business, within the scope of his employment. Although there is no doubt as to the permanent establishment of this rule, it has been frequently criticised as having no place, except by analogy, in a system of jurisprudence governing citizens having equal personal rights and liabilities.¹

Independent of the relation of master and servant or principal and agent, he who directs, counsels or procures another to commit a tort is liable as a principal. But where this relation exists, it is not necessary that the principal or master should expressly direct or have knowledge of the act done; it is enough that the servant or agent was acting in the business of his superior. It is true, that when the servant departs from the business for which he is employed, and does a wrong, the master is not liable. But in that business he is but the instrument of the master, and while acting in the scope of the business,

1. "The doctrine of the maxim *respondeat superior* was well applied to the head of the family under the Roman Law because neither son nor slave were *sui juris*. No action could be brought against them for any act or default, while under the American and English Law, the employe is liable for his own act or default. Under the Roman Law the *pater familias* was the only party who could be sued, and he might relieve himself of the responsibility of the act of his slave by surrendering the slave. The reason for the Roman rule was that none other than the head of the family could be sued. With us, the reason failing, the rule should also fail. The maxim *respondeat superior*, except by analogy, can have no place in a system of jurisprudence governing citizens having equal personal rights and liabilities. The English judges, solely on grounds of public policy, with a view of preventing responsible principals shielding themselves behind irresponsible agents or servants, assimilated the doctrine of the maxim of *respondeat superior* to the English Law, and made the maxim *qui facit per alium facit per se* one of the fundamental principles of the law of agency. The growth and expansion of this rule can be traced through the following English cases: *Michael v. Alestree*, 2 Levinz, 172; *Lord Raym*, 739, 2 Salk, 441; *Kingston v. Booth*, Skinner, 228; *Middleton v. Fowler*, Salk, 282; *McManus v. Crickett*, 1 East, 101; *Croft v. Alison*, 4 B. & Ald. 590." Note by Geo. W. Easley, 25 Am. & Eng. R. R. Cas., 514.

it makes no difference whether the injury done was the effect of negligence or willfulness of the servant. If the act is the result of the want of due care and control on the part of the master, he is responsible. Proper care to prevent injury to others must be taken.¹

§ 3. The Fellow Servant Rule not an Exception.—

The non liability of the master for the wrongful or negligent act of a fellow-servant is usually treated as an exception to the principle of the law of agency; whereas the doctrine of *respondeat superior* is the exception to the fundamental rule above set forth, that every one is responsible for his own wrongs and not for those of another, and the refusal to extend it to the relation of master and servant is the rule.

§ 4. Origin of Fellow Servant Rule—Priestly *v.* Fowler.—

The ancient rule of *respondeat superior* was applied without exception until the year 1837. In that year Lord Abinger decided *Priestly v. Fowler*,² and with this case begins the history of the fellow-servant rule. The effect of this decision upon modern jurisprudence has been characterized as second to no adjudication to be found in

1. *Luttrell v. Hazen*, 3 Sneed etc. Canal Co., 15 La. 169; S. C. 35 (Tenn.) 20; *Stone v. Cheshire R. Co.*, 19 N. H. 427; *Smith v. Webster*, 23 Mich. 298; *Alison v. Western North Carolina R. Co.*, 64 N. Car. 382; *Jones v. Glass*, 13 Ired. (N. Car.) 305; *Priester v. Augley* 5 Rich. (S. Car.) 44; *Tuel v. Weston*, 47 Vt. 634; *Carmen v. S. & I. R. Co.*, 4 Ohio St. 399; *Corrigan v. Union Sugar Refinery*, 98 Mass. 577; *Barlow v. Emmert*, 10 Kan. 358; *Gass v. Coblens*, 43 Mo. 377; *Mitchell v. Robinson*, 80 Ind. 281; *Thorp v. New York, etc. R. Co.*, 76 N. Y. 406; *Sherley v. Billings*, 8 Bush. (Ky.) 147; *Ware v. Barataria*, etc. Canal Co., 15 La. 169; S. C. 35 Am. Dec. 189; *Vogel v. Mayor, etc. of New York*, 92 N. Y. 17; *Thomas v. Winchester*, 6 N. Y. 397; *Courtney v. Baker*, 60 N. Y. 1; *Shea v. Reems*, 36 La. Ann. 969; *Snyder v. Hannibal, etc. R. Co.*, 60 Mo. 413; *Chicago, etc. R. Co. v. McCarthy*, 20 Ill. 385; *O'Connell v. Strong, Dudley (S. Car.)* 265; *Quarman v. Burnett*, 6 M. & W. 499; *Limpus v. London Omnibus Co.*, 1 H. & C. 526; *Patten v. Rea*, 2 C. B. (N. S.) 606; *Sadler v. Hemlock*, 4 E. L. & B. L. 570; *Burns v. Poulson L. R.*, 8 C. P. 563.
2. 3 Mees. & W. 1.

the reports¹. The plaintiff in this case was a servant of the defendant in his trade of a butcher, and the defendant desired him to go with certain goods of the defendant, in a van belonging to the defendant and conducted by another servant. The plaintiff accordingly went, but the van, being overloaded, broke down, and the plaintiff who was riding on it, was thrown off and his thigh broken. Under these circumstances the defendant was held not liable, Lord Abinger C. B. saying: "If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coachmaker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage, owing to the negligence of the coachmaker, or for a defect in the harness, arising from negligence of the harness-maker, or for drunkenness, neglect or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for

1. "It was decided by Lord Abinger without any reference to the earlier doctrine, but it constitutes a clear exception from which has flown a copious flood of all the modern law as to fellow servants and a common employment. It is not extravagant to say that this decision in its influence upon subsequent jurisprudence is second to no adjudication to be found in the reports. No other reported case has changed the current of decision more radically than this. All subsequent common law report books contain refinements upon the doctrine, here for the first time announced, that the superior may not under given conditions be held to respond for the tortious or negligent acts of his agent." Beach, *Contrib. Neg.* § 98.

example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed ; for that of the upholsterer for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself ; for the negligence of the cook in not properly cleaning the copper vessels used in the kitchen ; of the butcher in supplying the family with meat of a quality injurious to the health ; of the builder for a defect in the foundation of the house, whereby it fell and injured both the master and the servant by the ruins. The inconvenience, not to say the absurdity, of these consequences, afford a sufficient argument against the application of this principle to the present case. But, in truth, the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is no doubt bound to provide for the safety of his servant, in the course of his employment, to the best of his judgment, information and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself ; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment especially, which is described in the declaration in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail, would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect

the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against the master for damages could possibly afford. We are, therefore, of opinion that the judgment ought to be arrested."

§ 5. *Hutchinson v. York, New Castle & Berwick Railway.*—

The question did not come up again in England until 1850. In that year *Hutchinson v. York, New Castle & Berwick R. Co.*¹ was decided and the rule was first directly applied in England to railway companies. The nature of the case sufficiently appears from the judgment of Alderson, B., who said: "The question is whether the defendants are liable for the injury occasioned to one of their own servants by a collision while traveling in one of their carriages in discharge of his duty as their servant; in respect of which injury they would undoubtedly have been liable if the party injured had been a stranger travelling as a passenger for hire. We think that they are not. This case appears to us to be undistinguishable in principle from that of *Priestly v. Fowler*." His lordship then proceeded to state that case; to explain the principle upon which a master is in general liable for accidents resulting from the negligence or unskillfulness of his servant, and to show that a servant could not recover against his master for injury sustained in consequence of his own unskillfulness or negligence. He then continued: "The difficulty is as to the principle applicable to the case of several servants employed by the same master, and an injury resulting to one of them from the negligence of another. In such a case, however, we are of opinion that the master is not in general responsible. Put the case of a master employing A. and B., two of his servants, to drive his

¹ 5 Exch. 343; 19 L. J. Exch. 296.

cattle to market ; it is admitted if, by the unskillfulness of A., a stranger is injured, the master is responsible ; not so if A., by his unskillfulness hurts himself ; he cannot treat that as the want of skill of his master. Suppose then, that by the unskillfulness of A., B., the other servant, is injured while they are jointly engaged in the same service ; there, we think, B. has no claim against the master ; they have both engaged in a common service, the duties of which impose a certain risk upon each of them, and, in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant, and not of his master. He knew when he was engaged in the service that he was exposed to the risk of injury, not only from his own want of skill or care, but on the part of his fellow-servant also, and he must be supposed to have contracted on the terms that as between himself and master he would run that risk. Now, applying these principles to the present case, it follows that the plaintiff has no title to recover. H., the deceased, in the discharge of his duty as one of the servants of the defendants, had put himself into one of their railway carriages under the guidance of others of their servants, and by the neglect of those other servants, while they were engaged together with him in one common service, the accident occurred. This was a risk which H. must be taken to have agreed to run when he entered into the defendant's service, and for the consequences of which therefore they are not responsible. The declaration indeed states the accident to have arisen from the combined neglect of the servants who were managing the carriages in which the deceased was travelling, and other of their servants who were managing the train with which the plaintiff's carriage came into collision ; and it was argued that this allegation is divisible, and in order to sustain the declaration it would not be necessary to prove any negligence on the part of

the train in which H. was travelling ; but it would be sufficient to prove negligence on the part of the other train, and so it was contended that even admitting the defendants would not be liable for any neglect on the part of those who were managing the train in one of the carriages of which H. was travelling, yet there could be no principle exempting them from liability for the acts of those who, though equally with H. servants of the defendants, were not at the time of the accident engaged in any common act of service with him. But we do not think there is any real distinction between the two cases. *The principle is, that a servant when he engages to serve a master undertakes, as between himself and his master, to run all the ordinary risks of the service, and this includes the risk of negligence upon the part of a fellow-servant when he is acting in the discharge of his duty as a servant of him who is the common master of both.* The death of H. appears on these pleadings to have happened while he was acting in the discharge of his duty to the defendants as his masters, and to have been the result of carelessness on the part of one or more other servant or servants of the same masters while engaged in their service. And whether the death resulted from mismanagement of the one train or of the other, or of both, does not affect the principle ; in any case it arose from carelessness or want of skill, the risk of which the deceased had, as between himself and the defendants, agreed to run. It may, however, be proper, with reference to this point to add, that *we do not think a master is exempt from responsibility to his servant for an injury occasioned to him by the act of another servant, where the servant injured was not at the time of the injury acting in the service of his master.* In such a case the servant injured is substantially a stranger, and entitled to all the privileges he would have had if he had not been a servant. It was contended that the plea

in this case is bad on special demurrer, as being but an argumentative denial of the cause of action stated in the declaration; but this objection is unfounded. Though we have said that a master is not responsible generally to one servant for any injury caused to him by the negligence of a fellow servant while acting in one common service, yet this must be taken with the qualification that the *master shall have taken care not to expose his servants to unreasonable risk*. The servant, when he engages to run the risk of his service, including those arising from the negligence of fellow-servants, has a right to understand that the master has taken reasonable care to protect him from risk by associating him only with persons of ordinary skill and care; and the real object of the plea in this case is, to show that the defendants had discharged a duty, the omission to discharge which might have made them responsible to the deceased. The plea, therefore, appears not to be open to the objection insisted on. For these reasons we are of opinion that the plaintiff has shown no ground of action, and so our judgment must be for the defendants."

§ 6. *Murray v. South Carolina R. Co.*—

In America the first case came to trial at *nisi prius* in 1838, and was decided by the South Carolina Court of Errors in 1841. This was the case of *Murray v. South Carolina R. Co.*,¹ where it was held that a railroad company is not liable to one of their firemen for an injury arising from the negligence of a competent engineer.

The Judges, neither at *nisi prius* nor at the hearing on appeal, knew anything of *Priestley v. Fowler*. The decision is thus rendered more valuable as showing the concurrent opinion of the Judges of both countries, unbiased by each other. Judge Evans, in the course of his opinion

1. 1 McMullan (S. Car.) 385.

said: "With the plaintiff, the defendant contracted to pay hire for his services. Is it incident to this contract that the company should guarantee him against the negligence of his co-servants? It is admitted that he takes upon himself the ordinary risks of his vocation; why not the extraordinary ones? Neither are within his contract; and I can see no reason for adding this to the already known and acknowledged liability of a carrier, without a single case or precedent to sustain it. The engineer no more represents the company than the plaintiff. Each, in his several department, represents his principal. The regular movement of the train of cars to its destination is the result of the ordinary performance, by each, of his several duties. If the fireman neglects his part, the engine stands still for want of steam; if the engineer neglects his, everything runs to riot and disaster. It seems to me it is, on the part of the several agents, a joint undertaking, where each one stipulates for the performance of his several part. They are not liable to the company for the conduct of each other, nor is the company liable to one for the misconduct of another; and, as a general rule, I would say that where there was no fault in the owner, he would be liable only for wages to his servants."

Chancellor Johnson, in his concurring opinion, said: "The foundation of all legal liability is the omission to do some act which the law commands, the commission of some act which the law prohibits, or the violation of some act by which the party is injured. There is no law regulating the relative duties of the owners of a steam car, and the persons employed by them to conduct it. The liability, if any attaches, must therefore arise out of contract. What was the contract between the parties? The plaintiff, in consideration that the defendants would pay him so much money, undertook to perform the service of fireman on the train. This is all that is expressed. Is

there anything more implied? Assuming that the injury done was in consequence of the negligence of the engineer, the defendants would not be liable, unless they undertook to answer for his diligence and skill. Is that implied? I think not. The law never implies an obligation in relation to a matter about which the parties are or may, with proper diligence, be equally informed. No one will ever be presumed to undertake for that which a common observer would at once know was not true. The common case of the warranty of the soundness of a horse, notoriously blind, may be put in illustration. The warranty does not extend to the goodness of the eyes, because the purchaser knew, or might have known, with proper care, that they were defective. Now the plaintiff knew that he was not to conduct the train alone. He knew that he was to be placed under the control of the engineer. He knew that the employment in which he was engaged was perilous, and that its success was dependent on the common efforts of all the hands; and with proper diligence and prudence, he might have been as well, and it does not follow that he might not have been better, informed than the defendants, about the fitness and security of all the appointments connected with the train. If he was not, it was his own want of prudence, for which the defendants are not responsible. If he was, he will be presumed to have undertaken to meet all the perils incident to the employment."¹

1. The decision in the case of *Murray v. South Carolina R. Co.* was not unanimous. Two of the Judges, O'Neill and Johnston dissented, each writing an opinion. Johnston, J., argued very ingenuously, and raised a point which is even yet the subject of dispute. "I presume" he said, "no one will contend that the rule applicable to service in a railroad company, is, that the company is not liable to *any* agent, for *any* injury, provided the company can only show that another of its agents has inflicted it. Would it do to say, for example—and upon what principle could it be said—that a superintendent of the hands engaged in repairing the road, may, with impunity to the company, abuse his authority to the injury of their health. Or if the cars were to be run at night,

§ 7. *Farwell v. Boston & Worcester R. Co.*—

In 1842 the question came up in Massachusetts in the case of *Farwell v. Boston & Worcester R. Co.*,¹ Chief Justice Shaw writing an opinion, which has commanded a great amount of admiration and has been adopted as the leading judicial exposition of the law upon this question. The two preceding cases were before the Court, but Judge Shaw begins by stating that, while the court has had the benefit of those decisions, they would treat the case as of new impression. This case decided that where a railway company employed a switch-tender who was careful and trusty in his general character, and, after he had been long in their service, employed an engineer who knew the character of the switch-tender, the company were not answerable to the engineer for an injury received by him in consequence of the carelessness of the switch-tender, in the management of the switches. Chief Justice Shaw's able opinion contains the following language: "If we look from considerations of justice to those of policy, they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of

and, through the neglect of hands set apart to watch the road, and remove obstructions, the whole train were lost, and any hand on board were crippled, certainly no one means to assert that none of those could claim compensation from the company, but must look exclusively to the irresponsible agents (perhaps slaves) hired by the company, through whom the injury accrued? And yet how is the rule to be laid down—I wish to hear the rule stated—which would include that case and exclude this. The fidelity of the hands detailed to superintend the road, in the case I have supposed, would be as essen-

tial to the common enterprise of running the cars, as the fidelity of the hands on board to their respective duties. If the idea is indulged, that there is, in any branch of this enterprise, an implied undertaking among the servants to do the work jointly, and to waive the neglect of each other, what will constitute such an understanding? Where are its limits? Does it arise from the intimate connection of the hands? Then, I wish to be informed what degree of intimacy, what strength of association, is demanded to raise the implication? Where is the line."

1. 4 Metc. (Mass.) 49.

justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances. To take the well-known and familiar cases already cited; a common carrier, without regard to actual fault or neglect in himself or his servants, is made liable for all losses of goods confided to him for carriage, except those caused by the act of God or of a public enemy, because he can best guard them against all minor dangers, and because, in case of actual loss, it would be extremely difficult for the owner to adduce proof of embezzlement, or other actual fault or neglect on the part of the carrier, although it may have been the real cause of the loss. The risk is therefore thrown upon the carrier, and he receives, in the form of payment for the carriage, a premium for the risk he thus assumes. So of an innkeeper; he can best secure the attendance of honest and faithful servants, and guard his house against thieves. Whereas, if he were responsible only upon proof of actual negligence, he might connive at the presence of dishonest inmates and retainers, and even participate in the embezzlement of the property of the guests, during the hours of their necessary sleep, and yet it would be difficult, and often impossible, to prove these facts. The liability of passenger-carriers is founded on similiar considerations. They are held to the strictest responsibility for care, vigilance, and skill on the part of themselves and all persons employed by them and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it. Story on Bailments, § 590 *et seq.*

"We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, and can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for an indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrong doer."

The rule thus established was almost universally followed, and the labor of the courts since has been in properly applying it and determining its principal limitations.

§ 8. The Rule in Other Countries¹.—

France.—The very earliest time at which this question arose was possibly in the year 1834, where a man employed in loading a cargo was injured by the carelessness of a fellow-servant, and brought suit or damages before the Court of Lyons. Article 1384 of the Code Civil provided: "A person is liable, not only for the damage which he occasions by his own act, but also for that which is caused by

1. The information contained in this section as to the law in other countries is derived chiefly from a note by Geo. W. Easley, Esq., contained in Vol. 25, Am. & Eng. R. R. Cas., p. 510; a pamphlet by Chas. G. Fall, of the Suffolk Bar, entitled "Employers Liability for Personal Injuries to their Employees," Boston, 1883; and a monograph upon "Employers' Liability," by W. Irving Taylor: New York, 1889.

the acts of persons for whom he must answer, or for the things which he has in his keeping." The Court of first instance laid it down that the article did not apply to such a case, on the ground that the injured workman had accepted the danger. This judgment was affirmed on appeal, holding that when workmen are engaged together, and one sustains injury through the negligence of the other, the action lies against the wrong doer, but as against the employer, the salary was held to be set off against the risk.¹ This rule was followed in another case.² These rulings, however, were subsequently reversed, and it was determined that the above quoted article of the Code Civil rendered the employer liable.³ It may be stated that at present it is the law in France that the responsibility of the employer is never absolutely relieved. If the injury arises from the act of a fellow-workman, it lies with the Judge to estimate the facts absolutely, and to assign to each person his share in the responsibility. It makes no difference if the injured workman was under the authority of a fellow-workman, or in any position of superior authority in the employer's business generally.

Italy.—The Italian follows the French Code. Article 1153 of the Italian Code corresponds with article 1384 of the French, and would probably be given the same construction.⁴ The fact that an injury arose from the act of a fellow-workman is not taken into consideration in the law.

Prussia.—The law as it stood until June 7, 1881, recognized the doctrine of the non-liability of the employer when as Professor Brun, says: "These rules are not sufficient to meet the exigencies of modern life, es-

1. Dalloz, 1837, 2me partie, 161.

2. Dalloz, 1839, 2 me partie, 168.

3. Dalloz, 1841, iere partie, 271.

4. Beven's Emp. Liab. Act. 1880 p. 6.

pecially in the case of such great industrial undertakings as railways, shipping, carriers, factories, mines, etc. If, in accordance with the rules of Roman law, the liability of the employer is limited to his negligence in selection and supervision (*culpa in eligendo et custodiendo*), whilst otherwise the employee in fault is alone liable, and in cases of accident there is no liability at all, the profit gained and the risk incurred by the employer would be out of all proportion to each other, and almost the whole risk would be transferred to the public and to the workman." For this reason the German Commercial Code has, in the case of carriage by land and by water, and especially in the case of railways, introduced a general liability on the carrier, from which *vis major* is the only exception, and has gone so far as to prohibit contracts in derogation of this liability. Further provision for the liability to pay compensation in the case of death or personal injuries occurring in connection with railways, mines, quarries, pits and factories, is made by an imperial law of the 7th of June, 1871.¹

Ireland.—The Irish law closely follows the English.²

Scotland.—It is in the Scotch law that we find a decision where the question was one of first impression and uninfluenced by statutory or code enactments, holding the employer liable to an employee for the negligence of a fellow-servant. The case of *Dixon v. Rankin*,³ strongly asserts the liability of the employer, and asserted that the Scotch law was perfectly fixed, and admitted of no doubt

1. Ev. Mr. C. P. Ilbert, Doc. 362, Scotch. Sess. Cas. 493; Grey v. House Coms. Eng. Parl. 1876, p. 27. Brassey, 15 Court of Sessions Cas. Int. 315.

2. *McEnery v. Waterford, etc.*, R. Co., 8 Ir. C. L. R. 312; *Potts v. Plunkett*, 9 Ir. C. L. R. 290; *Carroll v. Hughes*, 6 Ir. Jur. N. S. 49.

3. 1 Smith & Bates Am. Ry. Cas. 569; see also *Sword v. Cameron*, 1

In the case last cited, Lord Cunningham said: "Although our reports for many years show that masters have been held liable to all third parties (without excepting fellow-servants) suffering from the negli-

whatever as to his liability. That case followed the earlier Scotch cases, and was decided in 1852. In 1855, the case *Reid v. Bartonshill Coal Co.*,¹ came before the Scotch court, and the Scotch court followed the rule in *Dixon v. Rankin*. On appeal to the House of Lords, it was declared that the Scotch law must be assimilated with the law of England, and from that time the course of decision in the two countries has harmonized. *McFarland v. Caledonian R. Co.*²

Roman Law.—It has been said that “at no period under the Roman law was the master liable for the negligence of a servant in injuring his fellow-servant.”³

§ 9. General Statement of the Rule.—

The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services. The perils arising from the carelessness and negligence of those who are in the same employment are no exception to this rule; and *where a master uses due diligence in the selection of com-*

gence and unskillfulness of other servants hired by the employer, followed up by the late case of *Rankin v. Dixon*, in the Second Division, the books hardly show the extent of the understanding in Scotland, as it is believed there is no man of common intelligence and experience in our affairs, who entertains a different opinion. Many industrious people may have relied on that security; and, at any rate, when servants in this country have suffered severe injury from the fault of another workman hired by the master, we are not entitled suddenly to abro-

gate the responsibility of the latter, existing at the date of their employment. The law of Scotland on this point has been long established and acted on, while this question is new in England, arising merely under an act recently passed; and I must, with perfect deference, remark that the reasons assigned in the English cases for the distinction urged by the defender, do not appear to be altogether satisfactory or reasonable.”

1. 3 Macq. 266.

2. 6 Macq. 102.

3. Bevens Emp. Liab. Act, 1880, p. 3.

petent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable (save for statutes to be noticed hereafter) to one of them for an injury received by him in consequence of the carelessness of another, while both are engaged in the same service. This rule has become so well established that the citation of authorities to support it seems almost superfluous.¹ The validity of the rule itself is not now denied by any American court. If it has been deemed too harsh and unjust to the employe, the remedy has always been sought in the legislature.

1. The following are leading or recent authorities affirming and applying the rule: *Chicago, etc. R. Co. v. Ross*, 112 U. S. 377; s. c. 17 Am. & Eng. R. R. Cas. 501; *Hough v. Railroad Co.*, 100 U. S. 213; *Murphy v. Boston & A. R. Co.*, 88 N. Y. 146; *Sherman v. Rochester, etc. R. Co.*, 17 N. Y. 153; *Laning v. New York, etc. R. Co.*, 49 N. Y. 521; *Farwell v. Boston & W. R. Co.*, 4 Metc. (Mass.) 49; *Smith v. Lowell Manuf. Co.*, 124 Mass. 114; *Johnson v. Boston Towboat Co.*, 135 Mass. 209; *Alabama, etc. R. Co. v. Waller*, 48 Ala. 459; *Fones v. Phillips*, 39 Ark. 17; *Memphis, etc. R. Co. v. Thomas*, 51 Miss. 639; *Howd v. Mississippi, etc. R. Co.*, 50 Miss. 178; *Chicago, etc. R. Co. v. May*, 108 Ill. 288; s. c. 15 Am. & Eng. R. R. Cas. 320; *Chicago, etc. R. Co. v. Rush*, 84 Ill. 570; *Chicago, etc. R. Co. v. Geary*, 110 Ill. 383; s. c. 17 Am. & Eng. R. R. Cas. 606; *Georgia, etc. R. Co. v. Rhodes*, 56 Ga. 645; *Shields v. Yonge*, 15 Ga. 349; *Keystone Bridge Co. v. Newberry*, 96 Pa. St. 246; *New York, etc. R. Co. v. Bell*, 112 Pa. St. 400; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Allegheny Heating Co. v. Rohan*, 118 Pa. St. 223; *Schultz v. Chicago, etc. R. Co.*, 67 Wis. 616; s. c. 58 Am. Rep. 881; *Brabbitts v. Chicago, etc. R. Co.*, 38 Wis. 289; *Luebke v. Chicago, etc. R. Co.*, 59 Wis. 127; s. c. 15 Am. & Eng. R. R. Cas. 183; *Peschel v. Chicago, etc. R. Co.*, 62 Wis. 338; s. c. 17 Am. & Eng. R. R. Cas. 545; *Fraker v. St. Paul, etc. R. Co.*, 32 Minn. 54; s. c. 15 Am. & Eng. R. R. Cas. 256; *Brown v. Winona, etc. R. Co.*, 27 Minn. 162; *Tierney v. Minneapolis, etc. R. Co.*, 33 Minn. 311; s. c. 21 Am. & Eng. R. R. Cas. 545; *Wonder v. Baltimore, etc. R. Co.*, 32 Md. 411; *Hanrath v. Northern, etc. R. Co.*, 46 Md. 280; *Criswell v. Pittsburgh, etc. R. Co.* (W. Va. 1888), 33 Am. & Eng. R. R. Cas. 232; *Riley v. Railway Co.*, 27 W. Va. 145; *Davis v. Central Vermont R. Co.*, 55 Vt. 84; s. c. 11 Am. & Eng. R. R. Cas. 173; *Hard v. Vermont, etc. R. Co.*, 32 Vt. 473; *Ayres v. Richmond & D. R. Co.* (Va. 1888), 33 Am. & Eng. R. R. Cas. 269; *Moon v. Richmond & A. R. Co.*, 78 Va.

§ 10. The Reasons for the Rule.—

Like the rule of *respondeat superior*, the fellow-servant rule is founded upon public policy,¹ and had its origin in the idea that the employe has the means of knowing just as well as the employer all the ordinary risks incident to the service in which he is about to engage, and that these,

745; s. c. 17 Am. & Eng. R. R. Cas. 531; *Robertson v. Terre Haute*, etc. R. Co., 78 Ind. 77; s. c. 8 Am. & Eng. R. R. Cas. 175; *Sullivan v. Toledo*, etc. R. Co., 58 Ind. 26; *Capper v. Louisville*, etc. R. Co., 103 Ind. 305; s. c. 21 Am. & Eng. R. R. Cas. 525; *Indiana Car Co. v. Parker*, 100 Ind. 191; *Peterson v. White Breast Coal Co.*, 50 Iowa 673; *Houser v. Chicago*, etc. R. Co., 60 Iowa 230; *Douglas v. Texas*, etc. R. Co., 63 Tex. 564; *Houston*, etc. R. Co. v. *Marcelles*, 59 Tex. 334; s. c. 12 Am. & Eng. R. R. Cas. 231; *Murray v. South Car. R. Co.*, 1 McMullan (S. Car.), 385; *Calvo v. Charlotte*, etc. R. Co., 23 S. Car. 526; s. c. 28 Am. & Eng. R. R. Cas. 327; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Burke v. Norwich*, 34 Conn. 475; *Mann v. Oriental Print Works*, 11 R. I. 152; *Louisville*, etc. R. Co. v. *Collins*, 2 Duv. (Ky.) 114; *Louisville*, etc. R. Co. v. *Caven*, 9 Bush (Ky.) 559; *Blake v. Maine Cent. R. Co.*, 70 Me. 60; *Carle v. Bangor* etc. R. Co., 43 Me. 269; *Lawler v. Androscoggin R. Co.*, 62 Me. 463; *Harper v. Indianapolis*, etc. R. Co., 47 Mo. 567; *Gormly v. Vulcan Iron Works*, 61 Mo. 492; *Nashville*, etc. R. Co. v. *Carroll*, 6 Heisk (Tenn.) 349; *Nashville*, etc. R. Co. v. *Wheless*, 10 Lea (Tenn.) 741; s. c. 4 Am. & Eng. R. R. Cas. 633; *Union Trust Co. v. Thomason*, 25 Kan. 1; *Hannibal*, etc. R. Co. v. *Fox*, 31 Kan. 587; s. c. 15 Am. & Eng. R. R. Cas. 325; *Willis v. Oregon R. & N. Co.*, 11 Oregon 257; s. c. 17 Am. & Eng. R. R. Cas. 539; *Hogan v. Cent. Pac. R. Co.*, 49 Cal. 128; *Brown v. Sennett*, 68 Cal. 225; *Berea*, etc. Co. v. *Kraft*, 31 Ohio St. 287; s. c. 27 Am. Rep. 510; *Whaalen v. Mad River R. Co.*, 8 Ohio St. 249; *Colorado* etc. R. Co. v. *Ogden*, 3 Colo. 499; *Slatterly v. Morgan*, 35 La. Ann. 1166; *Hardy v. Carolina Cent. R. Co.*, 76 N. Car. 5; *Chicago*, etc. R. Co. v. *Bayfield*, 37 Mich. 205; *Smith v. Flint*, etc. R. Co., 46 Mich. 258; *Ryan v. Bagaley*, 50 Mich. 179; s. c. 45 Am. Rep. 35; *Hobson v. New Mexico*, etc. R. Co., (Ariz.) 28 Am. & Eng. R. R. Cas. 360; *Burlington*, etc. R. Co. v. *Crockett*, 19 Neb. 138; s. c. 24 Am. & Eng. R. R. Cas. 390; *McAndrews v. Burns*, 39 N. J. L. 118; *Ewan v. Lippincott*, 47 N. J. L. 192; *Palmer v. Utah*, etc. R. Co., (Idaho) 13 Pac. Rep. 425; *Buckley v. Gould*, etc. Mining Co., 14 Fed. Rep. 833; *Thompson v. Chicago*, etc. R. Co., 18 Fed. Rep. 239; *Jordon v. Wells*, 3 Woods (c. c.) 529; *The Islands*, 28 Fed. Rep. 478.

1. The principal attack upon the doctrine of co-service has been based upon the assumption that grounds of public policy, which led to the adoption of the rule, no longer exist, and hence, that the rule of *respondeat superior* should apply as in other cases. Mr. W. Irving Taylor,

including the perils that might arise from the negligence of other servants in the same business, entered into the contemplation of the parties in making the contract; on account of which, the law implies, the servant or employe has insisted upon a rate of compensation which would indemnify him for the hazards of the employment. And again, the law supposes that the relation which the several employes sustain to each other, and the business in which they are engaged, would enable them better to guard against such risks and accidents, than could the employer. Besides, the moral effect of devolving these risks upon the employes themselves, would be to induce a greater degree of caution, prudence and fidelity, than would in all probability be otherwise exercised by them.¹

The reasons for the rule are clearly and forcibly stated by Shaw, J., in the *Farwell case*.² He said: "In considering the rights and obligations arising out of particular

in a pamphlet upon the subject, "Employers' Liability," (New York, 1889), says upon this point: "In conclusion it may be stated that it has of late been argued in favor of the doctrine of co-service, that although it may not, in all cases, be very logical, it is justified by 'public policy'—a very specious and high sounding phrase. In 1837, when the doctrine was first promulgated, the views as to what was for the public interest doubtless were that infant industries, in a country beginning to awaken to commercial and manufacturing activity, should be protected and fostered. Protective tariffs were then commonly held to be necessary, and it was thought expedient to shield feeble enterprises from expensive litigations and heavy damages for accidents to laborers. But corporations and industries have since at-

tained Herculean proportions, and we are beginning to question whether they need longer such tender care and nursing. Indeed, in these days where it seems to be pretty generally conceded that a sound public policy demands further assurances and protection to individual rights against the encroachments of monopolies and corporate power, this assertion is at least open to dispute. It would seem to be the chief policy of a civilized State to administer justice with as great impartiality as is possible under human limitations; and it has long been questioned whether this desideratum is attained under the present doctrine of co-service."

1. Lowe, C. J., in *Sullivan v. Mississippi & M. R. Co.*, 11 Iowa, 421.

2. 4 Metc. (Mass.) 49.

relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends to a great extent on the care and skill with which each other shall perform his appropriate duty, each is generally an observer of the conduct of the others, can give notice of any misconduct in capacity or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means, the safety of each will be more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other."

§ 11. Responsibility of Servant for Injury to Fellow Servant.—

It was at one time thought that many of the considerations of justice and policy, which led to the adoption of the rule that a master is not responsible to one of his servants for the injurious consequences of negligence of the others, were equally applicable to actions brought for like causes by one servant against another.¹ But this clearly erroneous idea has given way to the more just and reasonable rule, that where several persons are engaged in the same work in which the negligent or unskillful performance of his part by one may cause danger to the others, and in which each must necessarily depend for his safety, upon the good faith, skill and prudence of each of the others in doing his part of the work, it is the duty of each of the others engaged on the work to exercise the care

1. *Albro v. Jaquith*, 4 Gray H. & N. 247.
(Mass.) 99; *Southcote v. Stanley*, 1

and skill ordinarily employed by prudent men in similar circumstances, and he is liable for an injury occurring to any one of the others by reason of a neglect to use such care and skill.¹

1. Griffiths v. Wolfram, 22 Minn. (4th series) 748; Wiggett v. Fox, 185; Hinds v. Harbon, 58 Ind. 121; 11 Exch. 832; Degg v. Midland R. Hinds v. Overacker, 66 Ind. 547; Co., 1 H. & N. 773; Swainson v. Osborne v. Morgan, 130 Mass. 102, Northeastern R. Co., L. R., 3 Exch. overruling Albro v. Jaquith, *supra*; D. 341.
Wright v. Roxburgh, 2 Ct. Sess. Cas.

CHAPTER II.

CRITERION OF FELLOW SERVICE.

- § 12. Rules for Determination.
- 13. Elements entering into Rule. Common Employment.
- 14. Common Master.
- 15. Same—Masters Own Torts. Partners and Receivers.
- 16. Same—Negligence of Master and Fellow Servant combined.
- 17. Same—Contractors and Sub-Contractors.
- 18. Same—Servants of Different Railway Companies.
- 19. Volunteers.
- 20. Compulsory Service.
- 21. Minors.—Application of the Rule to.—
- 22. Illegal Employment—Sunday Work—Threats.
- 23. The true Criterion of Fellow Service.

§ 12. Rules for Determination.—

Ever since the decision of *Priestly v. Fowler*, judges and text writers have frequently essayed to lay down some rule or formula by which to determine what servants of a common master may be said to be fellow-servants within the rule which exempts the master from liability. The importance of such a rule is easily perceived; but the efforts to formulate it in such a way as to be of any practical value have been almost futile. Let us examine some of the rules laid down by the text writers. Judge Cooley states that "persons are fellow-servants when they engage in the same common pursuit under the same general con-

trol."¹ This definition is almost useless unless we are told what is meant by the words "same common pursuit" and "same general control." Judge Thompson, in his work on Negligence,² announces as a general rule, that "all who serve the same master, work under the same control, derive authority and compensation from the same common source, are engaged in the same general business, though it may be in different grades, or departments of it, are fellow-servants, who take the risk of each others negligence." This rule is more specific than Judge Cooley's, but it is unsatisfactory for the same reasons. Mr. Wood says³: "The true test of fellow service is the community in that which is the test of service—which is, subjection to the control and direction by the same common master in the same common pursuit." Here again, "the same common pursuit" are the undefined, yet indispensable words of the rule. Mr. Beach in his work on Contributory Negligence, devotes considerable space to the discussion of this question, and gives the following definition or description: "All servants in the employ of the same master, subject to the same general control, paid from a common fund, and engaged in promoting or accomplishing the same common object, are to be held fellow-servants in a common employment."⁴ Like the other authors he deals exclusively with undefined general terms. It will be seen that these rules are all stated so broadly that they are too general to be of much, if any, service. Most of the rules laid down in the decisions are of the same character. In *Massachusetts* it is said that "the rule of law, that a servant cannot maintain an action against his master for an injury caused by the fault or negligence of a fellow-servant, is not confined to the case of two servants working in company, or having opportunity to control or in-

1. Cooley on Torts, p. 541, note 1. 4. Beach Contrib. Neg. p. 338.

2. 2 Thomp. on Neg. p. 1026, § 31. § 115.

3. 3 Woods Ry. Law, § 338.

fluence the conduct of each other, but extends to every case in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty ; and it makes no difference that the servant whose negligence causes the injury is a sub-manager or foreman, of higher grade or greater authority than the plaintiff."¹

In *Maine*² it is said "persons who are employed under the same master, derive authority and compensation from the same common source, and are engaged in the same general business, although one is a foreman of the work and the other a common laborer, are fellow-servants, and take the risk of each other's negligence, the principal not being liable to the injured servant therefor. An exception to the rule exists if the master has delegated to the foreman or superintendent the care and management of the entire business, or a distinct department of it, the situation being such that the superior servant is charged with the performance of duties towards the inferior servant which the law imposes upon the master."

And in *Texas*³ Judge Thompson's rule is substantially reiterated : "Where two servants are employed by the same master, labor under the same control, derive their authority and receive their compensation from a common source, and are engaged in the same business, though in different departments of the common service, they are fellow-servants."

In *Bartonshill Coal Co. v. Reid*⁴, Lord Cranworth stated the rule as follows : "To constitute fellow-laborers within the meaning of the doctrine which protects the master from responsibility for the injuries sustained by

1. *Holden v. Fitchburg R. Co.*, 129 Mass. 268 ; s. c. 2 Am. & Eng. R. R. Cas. 94.

2. *Doughty v. Penobscot Log Driving Co.*, 76 Me. 143.

3. *Texas & P. R. Co. v. Harrington*, 62 Tex. 597 ; s. c. 21 Am. & Eng. R. R. Cas. 571 ; *Houston, etc.*,

R. Co. v. Rider, 62 Tex. 267.

4. 3 Macqueen 266.

one servant through the wrongful act or carelessness of another, it is not necessary that the servant causing and the servant sustaining the injury shall both be engaged in precisely the same or even similar acts. Thus, the driver and guard of a stage coach, the steersman and rowers of a boat, the man who draws the red hot iron from the forge and those who hammer it into shape, the engineer and switchman, the man who lets the miners down into, and who afterwards brings them up from the mine, and the miners themselves—all these are fellow-servants and *col-laborateurs* within the meaning of the doctrine in question."

§ 13. Elements Entering into the Rule.—Common Employment.—

Before attempting to deduce any general rule by which to determine what employes occupy the relation of fellow-servants to each other, it will be useful to examine the various elements and conditions which go to make up the rules set out in the preceding section, as well as other elements or conditions not there stated, but which certain courts have insisted upon. The first and most prominent of these is that of common employment. It may almost be said that the solution of the entire question depends upon the meaning which is given to these words. A prominent text writer¹ says: "As soon as the rule became recognized law, the courts were called upon to say what classes of cases the term included. Having established the rule, they were asked to apply it, and as case after case arose, it became necessary to determine whether it should have a wide or a narrow application. On the one hand it might be held to include only those employes who worked side by side in a similar occupation, as masons building a wall, or carpenters a house, or weavers attending adjacent looms; and on the other hand, it might be so extended as to include all employes of every

1. Beach, Contrib. Neg., § 115.

grade who are hired by the same person, as all the hands in a factory, or all the employes in a railway corporation; and between the two extremes would be found many various degrees, where the rule might be held to include or exclude occupations more or less dissimilar. The chief embarrassment seems to have been to settle whether it should be strictly confined to persons engaged in similar occupations, or should include any and every occupation, however essentially unlike. Some courts have done one thing, and some another, and decisions abound excluding and including almost every mentionable occupation." It is believed, however, that the question of what constitutes common employment is not, *per se*, a fundamental one. The words are of such comprehensive import that, unless they are defined by making a practical application, it is merely stating the rule anew, and in other words, to explain them. If the rule given *infra* is the correct one, it is useless to speculate upon the meaning of these words, as the question can be solved without it.¹

1. It has been said that the most approved test of a common employment is whether the injured servant can be said to have apprehended the possibility of injury from another servant while engaged in the service for which he hires. It is not necessary that both be engaged in the same or even similar acts, so long as the risk of injury from the one is so much a natural and necessary consequence of the employment which the other accepts that it must be included in the risks which have to be considered in his wages. Underhill on Torts, 52. C

In Illinois it is said that "a proper test of the existence of this relation may be to inquire whether the negligence of the one is likely to inflict injury on the other." *Valtez v. Ohio*

& M. R. Co., 85 Ill. 500.

There have been many cases in the English Courts, the decision of which turned upon the meaning to be attached to the phrase "common employment" and the tendency of the English decisions has been to give a very wide signification to the term. Here are some instances: a chief engineer and a third engineer on board a steamer; a laborer employed in loading bricks and a deputy foreman of plate layers; one of a gang of scaffolders and the foreman of the gang; a carpenter and joiner employed in painting an engine shed near a turn-table and the company's servants engaged in managing traffic, who negligently turned a carriage on the turn-table and upset a ladder, whereby the

§ 14. Common Master.—

It is almost universally admitted that the rule, that the common master of several servants, employed in the same service, is not responsible for an injury to one of said servants caused by the negligence of another, while engaged in a common employment, has no application to a case of common employment alone, without proof of a common master. It applies only where the action is brought for an injury to a servant or agent against the principal by whom such servant was himself employed.¹ The rule is clearly a just one. The exemption of the em-

painter was thrown down and injured; a miner and an underlooker, whose duty it was to superintend the mining operations, and a workman employed by an engine maker, and the foreman who ordered him to get on a travelling crane moving on a tramway, which fell and injured a workman. All of these have been held by the English Courts to be fellow-workmen. *Bevins, Emp. Liab. Act 1880*, p. 50.

1. *Svenson v. Atlantic, etc., S. S. Co.* 33 N. Y. Supreme Ct. 277; s. c. 57 N. Y. 112; *Young v. New York, etc. R. Co.*, 30 Barb. (N. Y.) 229; *Smith v. New York, etc., R. Co.*, 19 N. Y. 127; *Devlin v. Smith*, 89 N. Y. 470; *Philadelphia, etc., R. Co. v. State*, 58 Md. 372; s. c. 10 Am. & Eng. R. R. Cas. 792; *Catawissa R. Co. v. Armstrong*, 49 Pa. St. 186; *Stetler v. Chicago & N. W. R. Co.*, 46 Wis. 497; *Crusselle v. Pugh*, 67 Ga. 430; *Coggin v. Central, etc., R. Co.*, 62 Ga. 685; *Warburton v. Great Western R. Co., L. R.*, 2 Exch. 30; *Swainson v. North Eastern R. Co. L. R.*, 3 Exch. Div. 341; *Voce v. Lancashire & Y. R. Co.*, 2 H. & N. 728; *Abraham v. Reynolds*, 5 H. & N. 142;

Connolly v. Davidson, 15 Minn. 519; *Carroll v. Minnesota V. R. Co.*, 13 Minn. 30; *Gray v. Philadelphia & R. R. Co.*, 24 Fed. Rep. 168; s. c. 22 Am. & Eng. R. R. Cas., 351; *Zeigler v. Danbury & N. R. Co.* 52 Conn. 543; *Byrke v. Norwalk, etc., R. Co.*, 34 Conn. 474; *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492; *Hunt v. Pennsylvania, etc., R. Co.*, 51 Pa. St. 474; *Goodfellow v. Boston, etc., R. Co.*, 106 Mass. 461; *Curley v. Harris*, 11 Allen (Mass.) 113; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441; *Pennsylvania Co. v. Gallagher*, 40 Ohio St. 637; s. c. 48 Am. Rep. 689; *Wabash, etc., R. Co. v. Peyton*, 106 Ill. 534; *Jennings v. Grand Trunk R. Co.*, 15 Ont. App. 477.

A lessor is not liable to a servant of the lessee for an injury resulting from the negligence of the latter, unless it arose from some unperformed duty remaining upon the lessor, even though the servant was originally the servant of the lessor, was ignorant of the lease, and supposed himself still in the lessor's employ. *Crusselle v. Pugh*, 67 Ga. 430 s. c. 44 Am. Rep. 724.

ployer from liability to a servant for the negligence of a fellow servant rests upon the implied undertaking of the servant to assume the risks, necessarily incident to the service in which he engages, including the risks of the negligence of his fellow-servant in discharging duties which the employer cannot be expected to discharge personally. There is no reason why a third person, with whom there is no such implied undertaking, should be entitled to immunity from the results of the negligence of his servants, merely because the injured party is also an employe, who in the course of his employment is compelled to come in contact with the servants of such third party.

In *Massachusetts*, however, where the fellow-servant rule is strictly adhered to, it is held that one who employs master mechanics to do certain work under his agents' general direction, each to furnish the men, tools and tackle necessary for his work, is not, in the absence of negligence in their selection, liable for an injury resulting to a servant employed by one master mechanic through the negligence of another in furnishing imperfect tackle, or in the manner of using it.¹ So, in an action against a city to recover for personal injuries sustained by the plaintiff from the falling in, through the negligence of servants of the city, of the sides of a sewer which the city was constructing, and in which the plaintiff was at the time engaged in drilling a rock, the plaintiff offered to prove that he was in the employ of a man who employed a large number of men, and who, in his business of drilling and

The rule has been held not applicable to a case where a servant of a tenant has been injured by the negligence of a servant of the owner of a building, employed in the same room to manage an engine working an elevator upon which the injury occurred. *Stewart v. Harvard College*, 12 Allen (Mass.) 58.

A drover transported over a rail-

road upon a pass for the purpose of taking care of his stock, is a passenger for hire, and not a fellow-servant with the employes of the company. *Carroll v. Missouri Pac. R. Co.*, 88 Mo. 239, 26 Am. & Eng. R. R. Cas. 268.

1. *Harkins v. Standard Sugar Refinery*, 122 Mass. 400.

blasting rocks for all persons who employed him, sent his workmen from place to place to do work ; that the plaintiff with other servants of his employer was sent to drill and blast rock in the bottom of a sewer under the superintendence of a fellow workman, who received the same pay as the others ; that the workmen were to drill and blast the rock in the sewer in the places pointed out by the foreman of the sewer department of the city in charge of the whole work ; that all the work except the drilling and blasting was done by servants of the city ; that the whole work, including the drilling and blasting, was under the general supervision of the superintendent of sewers of the city, and under the direct charge of a foreman of the sewer department ; that the city paid the plaintiff's employer a certain sum per day for each of his men for the time they were actually employed, and the employer paid his men a less sum each per day, and directed them where to go and what to do, retaining control of them so far that he could change them from one place of work to another and dismiss them. The Court held that the plaintiff was a fellow-servant with the servants of the city whose negligence caused the injury, and that the action could not be maintained.¹

It is the injured party and the party causing the injury who must have a common master. Therefore, damages resulting to a servant from an injury to his wife, occasioned by the negligence of his fellow-servants, may be recovered by him from his master.²

1. *Johnson v. City of Boston*, 118 Mass. 114 ; see also *Wiggett v. Fox*, 11 Exch. 832 ; *Ewan v. Lippincott*, 47 N. J. L. 192 ; see "contractors and sub-contractors," § 17, *infra*.

2. *Gannon v. Housatonic R. Co.*, 112 Mass. '234. In this case the Court observed : "It is said that the general rule which exempts the mas-

ter from liability to his servant has a tendency to insure the safety of the public by increasing his care and fidelity, and that the public policy of the rule is equally applicable here. But if it be conceded that this is the true foundation of the rule, its bearing is too remote to influence the result to which we come in this case."

§ 15. Same—Master's own Torts—Partners and Receivers.—

The principle that a servant sustaining an injury from the negligence of a fellow-servant, while engaged in the common employment, cannot recover in an action against the common master, does not exempt from liability a master who himself takes part in the servant's work and while so doing injures the servant through negligence.¹ This has sometimes been spoken of as an exception to the rule, but in reality it is not an exception at all, but a direct application of the most general rule—that a tortfeasor must answer for his acts. If the master is a mem-

Evidence showing that the wife was working for her husband, who was keeping a boarding car and boarding the company's men, under an agreement that the company should retain their board, and pay it to the husband. *Held*, that the wife and the engineer of the train were not fellow-servants. *Brown v. Sullivan*, (Tex.) 10 S. W. Rep. 288.

1. *Ashworth v. Stanwix*, 3 El. & Bl. 701; 7 Jur. N. S. 467; 30 L. J. Q. B. 183; *Mellors v. Shaw*, 30 L. J. Q. B. 333; *Lorentz v. Robinson*, 61 Md. 64; *Busch v. Buffalo, etc., R. Co.*, 29 Hun. (N. Y.) 112; *Ryan v. Fowler*, 24 N. Y. 410; *Leonard v. Collins*, 70 N. Y. 90; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700.

In *Scott v. Craig*, 34 Jur. 401, a servant received injuries from the use of a defective scaffold, which was erected by a competent foreman and workmen under the supervision of the master. The Court held that as the master himself superintended the work, the negligence was his and not that of a co-servant, and the fact that the work was done under the direction of his foreman, did not relieve him from liability.

In *Ashworth v. Stanwix*, 3 El. & Bl. 701, Compton, J., said: "The

doctrine that a servant on entering the service of an employer takes on himself, as a risk incidental to the service, the chance of injury arising from the negligence of fellow-servants engaged in the common employment, has no application to the case of the negligence of an employer. Though the chance of injury from the negligence of fellow-servants may be supposed to enter into the calculation of a fellow-servant in undertaking the service, it would be too much to say that the risk of danger from the negligence of a master, when engaged with him in their common work, enters in like manner into his speculation. From a master he is entitled to expect the care and attention which the superior position, and presumable sense of duty of the latter ought to command. The relation of master and servant does not the less subsist because, by some arrangement between the joint masters, one of them takes on himself the functions of a workman. It is a fallacy to suppose that on that account the character of master is converted into that of fellow laborer."

ber of a partnership by whom the servant is employed, and the work in which he takes part is within the scope of the common undertaking of the partnership, his co-partners are jointly liable with him for the injury thus caused to the servant by his negligence.¹ Thus it has been held that where the boiler of one steamer near another exploded, thereby injuring a deck hand on the other, the fellow-servant rule did not apply, though the defendant was a partner in the business of running both boats.²

The liability of a receiver of an insolvent corporation, in his official capacity for an injury to his servant, sustained, while in his employment, by reason of the negligence of the receiver or the negligence of his agents, is usually determined by the same rules and principles that are applicable to persons or corporations.³

1. *Ashworth v. Stanwix*, 3 El. & Bl. 701; 7 Jur. N. S. 467.

2. *Connolly v. Davidson*, 15 Minn. 519.

In *Zeigler v. Day*, 123 Mass. 152, an action by a laborer against his employer to recover for personal injuries caused by the falling in of the sides of a sewer in which the laborer was at the time at work, there was evidence that the employer was a contractor for the construction of the sewer; that the laborer was at work at the time of the accident under the direction of a superintendent who had charge of the work and was admitted to be skillful and competent, and who was to receive, as compensation for his service, one-half the profits. Held that the superintendent was a fellow-servant of the laborer.

3. *Mearas v. Holbrook*, 20 Ohio St. 137.

A receiver of a railway is liable in an action for torts and injuries caused by his own negligence, default or misconduct, (*Klein v. Jewett*, 26 N. J. Eq. [11 C. E. Gr.] 474), or the negligence of the persons employed by him in operating the road, *Ohio & M. R. Co. v. Davis*, 23 Ind. 533; *Mearas Adm'r v. Holbrook*, 20 Ohio St. 137; s. c. 5 Am. Rep., 633; *Kinney v. Crocker*, 18 Wis. 74; *Kennedy v. Indianapolis C. & L. R. Co.*, 2 Flip. (U. S.) 704. See *Lamphear v. Buckingham*, 33 Conn. 237; *Ballou v. Farnum*, 91 Mass. (9 Allen) 47; *Barter v. Wheeler*, 49 N. H. 9; *Little v. Dusenberry*, 46 N. J. L. (17 Vr.) 614; s. c. 25 Am. & Eng. R. R. Cas. 632; *Davis v. Duncan*, 19 Fed. Rep. 477. It has been said that "it accords with sound principle and reason, that a receiver exercising the franchises of a railroad company, should be held amenable in his official capacity in the same rules of lia-

§ 16. Same.—Negligence of Master and Fellow Servant Combined.—

If the negligence of the master contributes to the injury to the servant, it must necessarily become an immediate cause of the injury, and it is no defense that another was likewise guilty of wrong. In *Grand Trunk R. Co. v. Cummings*,¹ the United States Supreme Court were called upon to determine the validity of the following instruction: "That if Noyes [the person claimed to be a co-servant] was negligent, and if the company was also wanting in ordinary care and prudence in discharging their duties, and such want of ordinary care contributed to produce the injury, and the plaintiff did not know of such want of ordinary care and prudence, the defendant would be liable; that if two of those causes contributed, the company would be liable; that the mere negligence of Noyes of itself does not exonerate them, if one of their own faults contributes." The Court held that there was no error in the instruction, Chief Justice Waite saying: "It was in effect that if the negligence of the company contributed, that is to say, had a share in producing the injury, the company was liable, even though the negligence of a fel-

bility that are applicable to the company while it exercises the same power of operating the road." *Mearns Adm'r v. Holbrook*, 20 Ohio St. 137; s. c. 5 Am. Rep. 633. See *Ohio & M. Co. v. Davis*, 23 Ind. 553; *Nichols v. Smith*, 115 Mass. 332; *Paige v. Smith*, 99 Mass. 395; *Potter v. Bunnell*, 20 Ohio St. 159; *Ex parte Brown*, 15 S. Car. 518; *Erwin v. Davenport*, 9 Heisk (Tenn.) 44; *Blumenthal v. Brainerd*, 38 Vt. 402; *Pope's Case*, 30 Fed. Rep. 169; *Winbourn's Case*, 30 Fed. Rep. 167.

In Michigan it has been questioned whether an action for injuries can be maintained against the receiver of a railroad company in

whose employment the party was at the time of the injury. See *Smith v. Flint & P. M. R. Co.*, 46 Mich. 258; s. c. 41 Am. Rep. 161. In Iowa the matter has been regulated by the Code, and an action may be maintained against the receiver of a railroad, appointed either by the Courts of the State, or a Circuit Court of the United States, by an employee of such railroad, who has been injured by reason of the negligence of a co-employee or fellow-servant. *Central Trust Co. v. Sloan*, 65 Iowa, 655; *Sloan v. Central Iowa R. Co.*, 62 Iowa, 728.

1. 106 U. S. 700; s. c. 11 Am. & Eng. R. R. Cas. 254.

low-servant of Cummings was contributory also," It has been held in New York that where the negligence of an engineer of a train in running it, is contributory with that of the company in not sending out a sufficient number of brakemen, and both together cause an injury to an employe, the negligence of the engineer does not relieve the company from liability.¹ And in *Stetler v. Chicago & N. W. R. Co.*,² the Court say: "We have examined with some care the question as to whether mere contributory negligence on the part of a co-employe or servant of the defendant would be a good defense for the master in an action by an employe or servant for an injury received on account of the alleged negligence of the master. We have been able to find but one case in which the question has been plainly before the Court, the case of *Paulmier, Adm'r, v. the Erie R. R. Co.*³ The Court held, in that case, 'that where the track of the company over a trestle-work was not capable of supporting an engine, and the engineer in charge had orders not to put his engine thereon, which orders he disobeyed, and the intestate of the plaintiff, who was a fireman on said engine, and who was unaware of said orders or of the danger, was thereby killed, the said trestle-work giving way, the plaintiff was entitled to recover, on the ground that such death was occasioned in part by the want of care in the defendant, the railroad company, with respect to said trestle-work;' and it was further held as a general rule of law, 'that where a servant receives an injury occasioned in part by the negligence of his master, and in part by that of a fellow-servant, he can maintain an action against his master for such injury, and that contributory negligence to defeat a right of action' must be that of the party injured.

"This case may appear to be in conflict with the opin-

1. *Booth v. Boston & A. R. Co.*,
73 N. Y. 38.

2. 46 Wis. 497.

3. 5 Vroom (N. J.) 151.

ion cited in 9 Allen, *supra*,¹ but it is not so in fact. Chief Justice Beasley, who delivered the opinion, announces the same principle which was announced in the case in Allen. He says: 'The principal ground on which a new trial is asked in this case is, that it was clearly shown by the evidence that the accident by which the intestate lost his life was occasioned, not by the negligence of the defendants themselves, but by that of their employees. They said that their road-bed extending over the water was properly constructed in view of the purpose for which it was designed, and that it was misapplied to another purpose by their servants, contrary to their orders. If these were the facts of the case, the position would be well taken.' The learned Chief Justice afterwards gives his reasons for holding that the rule above claimed by the defendant was not applicable to the facts of the case, and that the defendants were guilty of negligence, although they had directed their engineers to stop their locomotives at the end of the trestle-work, and not run them on to it. He says: 'Stripped of all verbal disguises, the arrangement is this: that by their arrangements they required their employes almost hourly to run their engines to the brink of danger, and that their orders were to stop there. The road-bed over the water was supported by wood-work, which the defendants admit was dangerous to a locomotive, and what they required was that the locomotive should be stopped on the fast land. As occasion called for it, in pushing the loaded cars out over the water, the engines were brought necessarily to this line between the water and land. Here was a danger constantly recurring, just as imminent as though the requirement had been to run these engines on to the edge of a precipice. And to make the matter worse the danger in this case was entirely

1. Durgin v. Munson, 9 Allen (Mass.) 396.

latent ; there was nothing to indicate that this part of the road extending beyond the land would not support a locomotive. It is obvious that it required the constant exercise of skill and vigilance to avoid this unnecessary risk, and yet it is not pretended that there was any notification to the engineers and other employes, of the insecurity of this part of the road-bed. * * * It is manifest from the evidence on both sides, that adequate means to inform the parties in charge of these locomotives of the peril at hand were not used ; for several of the engineers themselves testify that occasionally they put their engines upon this insecure structure. Some of them said they were not aware of its insecurity. These circumstances seem to me to constitute a legal default in the defendants.' In this case it was properly held to be negligence on the part of the corporation to require its employes to run their engines to the very edge of a great danger, without providing any proper means for arresting the locomotives at the exact point of danger, and without informing their employes that if they passed the point indicated for stopping their locomotives, there would be imminent danger of the destruction of both themselves and the engines in their charge. The reasoning in this case, as applied to the facts of the case at bar, would go to this extent and no farther, that if the conductors and other employes of the defendant, who were directed to run trains over this short track, and when directed to do so, were also directed to run slow, did not understand, and ought not from the fact of such direction, to have understood, that such track was not in a condition to permit of the running of trains rapidly over the same without incurring danger, then the fact that the conductor or engineer disobeyed the order to run slowly would be no defense to the action, if the jury found that the track was not in such a state of repair, in view of the purposes for which the track was used, as to

permit trains, used with ordinary care, to pass over the same with safety.

"After giving the question such consideration as we have been able to give, we are inclined to hold, as was held in the case of *Paulmier v. The Erie R. R. Co.*, *supra*, that where the negligence of the railroad company directly contributes to the injury of an employe, the company must be held liable, though it also appears that the negligence of a co-employe contributed to such injury, and that the rule is universal, that contributory negligence to defeat an action, must be the negligence of the plaintiff or of some other person for whose acts he is responsible." And this is unquestionably the correct rule as it is the just one.¹

§. 17. Common Master.—Contractors and Subcontractors.—

As a general rule it may be stated that the servants of an employer and those of his contractor are not fellow-servants.² The application of this rule is illustrated by a

1. *Clark v. Soule*, 137, Mass. 380; *Atchison T. & S. F. R. Co. v. Holt*, 29 Kan. 149; s. c. 11 Am. & Eng. R. R. Cas. 206; *Ellis v. New York, etc., R. Co.*, 95 N. Y. 546; s. c. 17 Am. & Eng. R. R. Cas. 641.
2. *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124; s. c. 15 Am. Rep. 387; *Barrett v. Singer Mfg. Co.*, 1 Sweeny (N. Y.) 545; *Devlin v. Smith*, 89 N. Y. 470; s. c. 42 Am. Rep. 311; *Smith v. New York, etc., R. Co.*, 19 N. Y. 127; *Hass v. Philadelphia & S. M. S. S. Co.*, 88 Pa. St. 269; s. c. 32 Am. Rep. 462; *Cunningham v. International R. Co.*, 51 Tex. 503; s. c. 32 Am. Rep. 632; *Riley v. State Line S. S. Co.*, 29 La. Ann., 791; s. c. 29 Am. Rep. 349; *Goodfellow v. Boston, etc., R. Co.*, 106 Mass. 461; *Burke v. Norwich, etc., R. Co.*, 34 Conn. 474;
1. *Clark v. Soule*, 137, Mass. 380; *Hayes v. Western R. Co.*, 3 Cush. (Mass.) 270; *Crutchfield v. Richmond, etc., R. Co.*, 76 N. Car. 320; *Perry v. Ricketts*, 55 Ill. 234; *Chicago, etc., R. Co. v. Jackson*, 55 Ill. 495; *Cone v. Delaware, etc., R. Co.*, 81 N. Y. 206; s. c. 2 Am. & Eng. R. R. Cas. 57; 37 Am. Rep. 491; *Cayzer v. Taylor*, 10 Gray (Mass.) 274; *Stetler v. Chicago & N. W. R. Co.*, 46 Wis. 497; *Paulmier v. Erie R. Co.*, 5 Vroom (N. J.) 151; *McMahon v. Henning*, 1 McCrary (U. S.) 516; *McDade v. Washington, etc., R. Co.*, 5 Mackey (D. C.) 144; s. c. 26 Am. & Eng. R. R. Cas. 325; *Ransier v. Minneapolis, etc., R. Co.*, 32 Minn. 331; s. c. 21 Am. & Eng. R. Cas. 601; *Elmer v. Locke*, 135 Mass. 575; s. c. 15 Am. & Eng. R. R. Cas. 300;

New York case.¹ A workman while employed upon a barge which was engaged in lightening a steamship, was injured through the negligence of one engaged upon the steamship in discharging her cargo. In an action to recover for the injury, defendant's answer admitted that, at the time of the accident, defendant owned and had the control and management of the steamer; the barge was not owned by the defendant, and plaintiff was employed and paid by its master. The Court held, that the proof, together with the admission in the answer, was sufficient to authorize the jury to find that the man who caused the injury was a servant of defendant and working for it at the time; and that he and the plaintiffs were not fellow-servants. In this case, the Court said: "There was no proof that the plaintiff and the man who caused the injury to him were fellow-servants. The latter was in the employment of the defendant, engaged in unloading the cargo from the steamship upon the lighter. The former was in the service of the owners of the lighter, in receiving the cargo and transporting the same to the city of New York. They were not the servants of a common principal in any sense, and they were not strictly engaged in the same employment. The duties of the one were confined to the steamship and of the other to the lighter. Hence, this case does not fall within the rule that an employer is not responsible for an injury occasioned to one employee by another engaged in the same general employment." In another New York

Lake Superior Iron Co. v. Erickson, 39 Mich. 492; s. c. 32 Am. Rep. 423; *Coggin v. Central, etc., R. Co.*, 62 Ga. 685; *Abraham v. Reynolds*, 5 H. & N. 142; *Woodley v. Metropolitan R. Co.*, 2 Exch. Div. 284. *Turner v. Great Eastern R. Co.*, 33 L. T. 431.

Where employees of a contractor for the brick work of a building

erect a scaffold at a great height, he is not liable for the death of a painter employed by the owner of the building, who is killed while passing over it, by its fall to the ground. *Maguire v. Magee* (Pa.) 12 Cent. Rep. 414; s. c. 13 Atl. Rep. 551.

I. Svenson v. Atlantic Mail S. S. Co., 57 N. Y. 108.

case¹ it was held that a servant of a contractor for repairing a railroad bridge, injured by a passing train, through the negligence of the company's servants, may recover from the railroad company. And in an Iowa case² the Court remarked: "The deceased, although a subcontractor for the building of bridges, and therefore indirectly in the employ of the defendants, yet his duties were so entirely in another department, and wholly disconnected with operating the road, as that his relation to the employes managing the train which ran over him cannot be, in any proper sense, said to be that of a co-servant." In Mississippi it has been held that a laborer employed by a contractor for grading a railroad, and a locomotive engineer in the employ and under the control of the company in the same work, are not fellow-servants.³ In New Jersey, however, this question was presented in a recent case⁴ and a different conclusion was reached. The facts were these: The defendant, owning a sawmill, employed master machinists to repair the waterwheel, and the machinists sent the plaintiff, with others, to do the work. It was understood between the workmen and the defendant that the mill should be run when they were not working on the

1. *Young v. New York Cent. R. Co.*, 30 Barb (N. Y.) 229.

2. *Donaldson v. Mississippi, etc., R. Co.*, 18 Iowa 280.

3. *Louisville, etc., R. Co., v. Conroy*, 63 Miss. 562; s. c. 56 Am. Rep. 835.

4. *Ewan v. Lippincott*, 47 N. J. L. (18 Vroom) 192.

A company having begun sinking a shaft in their colliery, for which purpose they had fixed an engine near the mouth of the shaft, agreed with W. to do the sinking and excavating at a certain price per yard, W. to find all labor, the company to provide and place at the disposal of W. the necessary engine power,

ropes and hoppets, with an engineer to work the engine (who was employed and paid by the company), the engine and engineer to be under the control of W. One of the men employed and paid by W., while working at the bottom of the shaft, was injured by the negligence of the engineer. *Held*, that though the engineer remained the general servant of the company, yet being under the orders and control of W. at the time of the accident, he was acting as the servant of W., and not of the company, which was therefore not liable for his negligence. *Rourke v. White Moss Colliery Co.*, 2 C. P. D. 205; 46 L. J., C. P. 283.

wheel. While they were so at work, the defendant's engineer negligently started the wheel, injuring the plaintiff. The Court held that the engineer and the plaintiff were fellow-servants, and that the defendant was not liable. Reed, J., writing the opinion, said: "An examination of the cases in which the character of a servant has been considered will, however, disclose the fact that there is no legal test of service by which in all cases it can be determined whether an employee is a servant. He may be a servant for one purpose and a volunteer or contractor for a different purpose. He may be the servant of one master viewed in one aspect, and at the same time be considered as the servant of another person for the purposes of carrying out a legal policy."¹ This is also the doctrine of the Massachusetts Court,² and is adhered to in an Illinois decision.³

It is sometimes a difficult matter to determine who are contractors under the rule above set forth. This is illustrated by an English case, where the defendants were brewers, having upon the Thames a wharf, where coals

1. Concerning this last remark, 46.

Mr. McDonnell, in his well-digested book on this branch of the law, speaking of the observation of Baron Parke that a man cannot be the servant of several masters at the same time, thus writes: "A cannot be the servant of B and C in the sense that he is bound to obey both. He may, however, be the servant of both in such a sense that he may be prosecuted for embezzlement by B or C as a clerk or servant; that B or C may be liable to strangers for his torts; and that while the servant of B he cannot claim damages against C for the acts of C's servants, inasmuch as he is in law their fellow-servant." McDonnell on Master and Servant

2. *Johnson v. City of Boston*, 118 Mass. 114.

3. *Illinois Cent. R. Co. v. Cox*, 21 Ill. 20; s. c. 71 Am. Dec. 148.

In this case it was held that where A contracts to deliver wood to a railroad company, the company to furnish the equipment to move it, the men on the train to obey the orders of the contractor, one of the servants employed by him to load wood upon the car having been thrown off and killed, the parties were all servants of the company, and that no recovery could be had by the administratrix for his death. See also *Rourke v. White Moss Colliery Co.*, L. R. 1 C. P. Div. 556.

were discharged to be used in their business. The plaintiff was hired by A. to assist in unloading a barge at the wharf of the defendants. The plaintiff and A., with other men, formed a gang, the members of which were paid by the defendants, at the rate of 1s. 9d. for every ton of coals discharged; one of the men was to receive from the defendant the money due for unloading the barge and to distribute payment amongst them; the defendants alone had power to dismiss the plaintiff. Whilst the plaintiff was engaged in unloading the barge, a servant of the defendants, who was engaged in moving some barrels, negligently let one of them slip upon an upraised flap, which fell and caused the plaintiff injury. The plaintiff had frequently been at the spot when the barrels were being moved. The Court held, that the defendants were not liable to compensate the plaintiff for the injury sustained by him; for A. held the position of a foreman and not of a contractor, and the plaintiff was servant to the defendants, and he was engaged in a common employment with the servant by whose negligence the injury happened, and there was no concealed danger.¹

The servants of a subcontractor are usually not considered as fellow-servants of the contractor's employes.² Thus, one who is employed by a dealer in lumber, to deliver lumber upon an unfinished bridge to subcontractors who have undertaken to build the wooden portion thereof, has been held entitled to recover damages against the contractors who have undertaken to build the entire superstructure, for an injury sustained by him while so delivering lumber, through a defect in the ironwork of that portion of the bridge which has been completed.³ In the case of *Wiggett v. Fox*,⁴ however, the defendants, who

1. *Charles v. Taylor*, 3 C. P. D. 24.
492; 38 L. T. 773.

2. *Murphy v. Carali*, 3 H. & N. (Mass.) 113.

462; *Murray v. Currie* L. R., 6 C. P. 4. 11 Exch. 832.

3. *Curley v. Harris*, 11 Allen.

had contracted with the Crystal Palace Company to erect a tower, made a subcontract with M. and four others to do by piece particular portions of the work. The workmen of the subcontractor were paid weekly by the defendants, according to the time which they worked. The subcontractor received from the defendants' foreman directions as to the execution of the piecework. The persons who contracted with the defendants to do piecework signed printed regulations by which they were not at liberty to leave their employment till after they had completed their work, and had given a week's notice. A man who was employed by a subcontractor was killed by a workman in the service of the defendants. The jury found that the deceased was the servant of the contractor. The Court remarked that the subcontractor and all his servants must be considered, for this purpose, the servants of defendants whilst engaged in doing work, each devoting his attention to the completion of the whole work, and working together for that purpose.

§ 18. Same.—Servants of Different Railway Companies.—

Arrangements are often made between different railway companies, having lines which connect, to run trains over each other's track; but whatever effect an agreement between the several companies owning connecting lines may have upon the parties thereto, it cannot have the effect of making those who were employed and paid wages by either of the contracting parties, the co-employees of the agents and workmen of the other parties, or make the others liable either severally or jointly for any loss or damage caused by the neglect of any one of them, even where the agreement is silent in this respect.¹

1. In an action to recover damages for killing plaintiff's intestate through the negligence of defendant's servants, it appeared that the

intestate was a servant of another railroad company, and while at work in their pit as an ashman, was run over by an engine of defendant's

Thus, where an injury to an employe of one of said companies occurs on the road of another, and is caused by the imperfect condition of the road, the principle that every employe assumes the risk of the negligence of his co-employes, is not applicable to him.¹ And where the servant of one railroad company, running its trains over the track of another, is injured by reason of the negligence of the servants of such other company, he is not debarred from bringing his action against the company employing him.) The servant occasioning the injury is not to be regarded as a fellow-servant.² But in Illinois it has been decided that where an engine driver of one company running upon the road of another, was injured in a collision occasioned by the negligence of the servants of such other company, he was not entitled to recover damages from the

company which had permission from the other company to use the track. *Held*, that intestate and defendant's engineer and fireman were not fellow-servants so as to relieve defendant from liability for their negligence. *Sullivan v. Tioga R. Co.*, (N. Y. 1889) 20 N. East Rep. 569.

1. *Philadelphia, etc., R. Co. v. State*, 58 Md. 372; s. c. 10 Am. & Eng. R. R. Cas. 792.

An employe of the P. Company was killed in an accident while the train of the former was on the track of the A. road. *Held*, that deceased was not an employe of the A. Company. *Augusta, etc., R. Co. v. Killian*, 79 Ga. 234; s. c. 4 S. E. Rep. 165.

2. *Catawissa R. Co. v. Armstrong*, 49 Pa. St. 186; *Sawyer v. Rutland & B. R. Co.*, 27 Vt. 370.

To the same general effect are other authorities. In *Stetler v. Chicago & N. W. R. Co.*, 46 Wis. 497,

it was decided that a railroad company, running its trains on the tracks of another company, was liable to its employees for an injury occasioned by a defect in the track, and the doctrine of "fellow-servants" was not mentioned, the court evidently considering it to have no application.

In *Carroll v. Minnesota V. R. Co.*, 13 Minn. 30, the defendant and a steamboat company were operating under an arrangement by which defendant was to carry passengers and freight between St. Paul and Belle Plain and the steamboat company was to carry them between Belle Plain and Mankato. Each sold tickets over the route of the other. *Held*, that the servants of one of the companies were not fellow-servants to those of the other so as to prevent the servants of one recovering from the other for injuries by the negligence of its servants.

company employing him, the collision having been one of the risks of his employment, which he undertook to run.¹

Where actions are brought by the servants of the company using the track, against the owners thereof, the same principles apply. Thus a switch-tender, employed by a railroad company on a portion of its track upon which it permits another company to run trains, is not a servant of the latter; and an engineer of the latter, injured by the negligence of such switch-tender, may maintain an action against the switch-tender's employer.² In *Vose v. Lancashire & Yorkshire R. Co.*,³ where a station was jointly occupied by two railroad companies, a servant of one, injured by the negligence of the servants of the other, was held entitled to recover damages from the company the employes of which were in fault. Said employes, it was said, were not fellow-servants. To the same effect is *Warburton v. Great Western R. Co.*,⁴ where the porter of

1. *Clark v. Chicago, etc., R. Co.*, 92 Ill. 43.

2. *Smith v. New York & H. R. Co.*, 19 New York 127; *In re Merrill* 54 Vt. 200; s. c. 11 Am. & Eng. R. R. Cas. 680.

If a railroad company, whose road forms a junction with another road, entrusts a person employed and paid by such other road with the business of attending to its trains at such junction, the fact that he was employed by the other company does not release it from liability for damages caused by his negligence. *Taylor v. Western Pac. R. Co.*, 45 Cal. 323.

The D. & N. and the S. railroads connected, forming a continuous line. By an arrangement between the two companies, a train owned and run by the S. company went over both roads to a certain point and back daily, the D. & N.

company paying the S. company monthly an agreed price for the service upon its road. The train, when on the road of the D. & N. company, was under its general control and governed by its rules, and it had entire control of the hands upon it; but the S. company was at liberty to use what engine and employ what hands it pleased. The plaintiff was a brakeman on this train and was injured by a collision with a train of the D. & N. company on its own road, caused by the negligence of the conductor of that train. *Held*, that the plaintiff was not an employee of the D. & N. company, and that the conductor of the other train was therefore not his fellow-servant. *Zeigler v. Danbury & Norwalk R. Co.*, 52 Conn. 543.

3. 2 H. & N. 728.

4. 2 Exch. 30.

a railroad company using the station of another company was allowed to recover damages for an injury occasioned by the negligence of the servants of the latter. In a recent case¹ this doctrine was carried to its furthest extent. It appeared that the stations of two railroad companies closely abutted. The plaintiff was a signalman, employed by but one of the companies, and in its uniform. He discharged his duties, however, in connection with the trains of both roads, and was injured by the negligence of the employes of the other company. He brought an action against said company, and it was strenuously argued that the negligence in question was that of a fellow-servant. The court, however, decided the contrary, and the plaintiff recovered. Where a fireman on a railroad train is injured by a collision at a crossing of two roads, brought about by the concurring negligence of the engineer on his train and of the employes of the other road, his right to recover damages for such injury from the other road will not be defeated by reason of the negligence of the engineer.²

Where there is any partnership agreement between two roads, or other arrangement in the nature thereof, the servants of either road will become co-employees, and cannot of course recover for the negligent acts of each other.³ As to what constitutes such a partnership agreement as to produce this effect, there is a lack of decided cases. An agreement between two roads, to connect at

1. *Swainson v. North Eastern R. Co. L. R.*, 3 Exch. Div. 341.

In this country the cases are not decisive. Dicta, following the English authorities, will be found in *Smith v. New York & Harlem R. Co.*, 6 Duer (N. Y.) 225; and *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441. A dictum to a contrary effect is contained in *Cruty v. Erie R. Co.*, 3 Thomp. & C. (N. Y.) 244. These cases all, however, turn on another

point, involving the duty of the company owning the track, to the servants of another company using it with regard to the condition of the road. It is liable, it seems, in such case for any defect therein.

2. *Gray v. Philadelphia & R. R. Co.*, 24 Fed. Rep. 168; s. c. 22 Am. & Eng. R. R. Cas. 351.

3. *Swainson v. North Eastern R. Co. L. R.*, 3 Exch. Div. 341.

their respective termini, and to sell through tickets and charge through rates, is not such an arrangement, at least where the fare and freight remain distinct on each line. In such case the servants of the respective companies are not to be considered as co-employees.¹

- ✓ Employees of a lessee company are not co-servants of employees of lessor company, although subject to the orders of the latter while running over the lessor company's road.² But it has been held that when two railway companies occupy and use a portion of the same road as a common track, the one as owner thereof, and the other as lessee, under proper rules and regulations as to the joint use so as to secure care and safety, the lessor company, in the employment of servants to operate its trains over such road, does not impliedly contract with such servants, that the employees of the lessee company will observe strictly the rules adopted to secure safety in the running of trains over the same road, and will not be

1. *Carroll v. Minnesota V. R. Co.*, 13 Minn. 30.

2. *Phillips v. Chicago, etc., R. Co.*, 64 Wis. 475; s. c. 23 Am. & Eng. R. R. Cas. 453. But in *Chicago, etc., R. Co. v. Clark*, 2 Ill. App. 596, it was held that, where one railroad company leases to another its track, the lessee's trains running subject to the control of the lessor, the employees of the two companies are to be regarded as the fellow-servants of the lessor. Where one railroad is leased and operated by another exclusively, the company lessee is alone responsible for injuries committed in the course of operating the road. *McMillan v. Michigan S. & N. I. R. R. Co.*, 16 Mich. 79, 102; *Sprague v. Smith*, 29 Vt. 421; *McClure v. Manchester & L. R. R. Co.*, 13 Gray (Mass.) 124; *Feistal v. Middlesex R. Co.*, 109 Mass. 398; *Ditchett v. Spuyten Duyvil & P. M. R. Co.*, 67 N. Y. 425; *Pittsburgh C. & St. L. R. Co. v. Campbell*, 86 Ill. 443; *Wasmer v. Delaware, L. & W. R. Co.*, 80 N. Y. 212; s. c. 1 Am. & Eng. R. R. Cas. 122; *Fontaine v. Southern Pacific R. Co.*, 54 Cal. 645; s. c. 1 Am. & Eng. R. R. Cas. 159; *Dickson v. Chicago, R. I. & P. R. Co.*, 2 Am. & Eng. R. R. Cas. 538; *Pittsburgh, etc., R. Co. v. Hunt*, 71 Ind. 229; s. c. 2 Am. & Eng. R. R. Cas. 649; *Central R. R. Co. v. Brinson*, 14 Ga. 475; s. c. 8 Am. & Eng. R. R. Cas. 343; *Atchison, T. & S. F. R. Co. v. Cruzen*, 31 Kan. 718; s. c. 15 Am. & Eng. R. R. Cas. 515.

held liable to a servant for an injury caused by the negligence of the servants of the lessee company.¹

§ 19. *Same.—Volunteers.*—

It is the generally accepted rule that a person who voluntarily, and without any employment, undertakes to perform a service for another, stands in the same relation as a servant for the time being, and is regarded as assuming all the risks incident to the business and the fellow-servant rule applies to such persons.²

The stranger, by volunteering his assistance, cannot impose upon the master a greater liability than that in which he stands towards his own servant; and if the master takes care that his servants are persons of competent skill and ordinary carefulness, he is not liable for any injury that one of them may receive from the negligence of another.³ Accordingly, where the servants of a railway company were turning a truck on a turn-table, and a person not in the employment of the company volunteered to assist them, and while so engaged, other servants of the company negligently propelled a steam engine, and thereby caused the death of the person who so volunteered, it was held that the company was not liable in an action by the personal representative of the deceased.⁴ But it is not in every case where a party works with the servants of another for a common purpose, that he becomes a volunteer so as to prevent his maintaining an action against that

1. *Clark v. Chicago, etc., R. Co., Haute, etc., R. Co.*, 78 Ind. 292; s. c. 92 Ill. 43.

2. *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210; s. c. 8 Am. Rep. 251; *Mayton v. Texas & Pac. R. Co.*, 63 Tex. 77; s. c. 51 Am. Rep. 637; *Osborne v. Knox, etc., R. Co.*, 68 Me. 49. And see *New Orleans, etc., R. Co. v. Harrison*, 48 Miss. 112; s. c. 12 Am. Rep. 356; *Everhart v. Terre*

3. *Potter v. Faulkner*, 1 B. & S. 800; 8 Jur. N. S. 259; 31 L. J. Q. B. 30.

4. *Degg v. Midland R. Co.*, 1 H. & N. 773; 26 L. J. Exch. 171.

party, for an injury accruing from the negligence of his servants, while working for the common purpose. Thus, A. sold to B. some bales of cotton, which were in the upper story of a warehouse. B. employed C. to see it weighed, and lower it by means of a rope into a cart, which he contracted with D. to provide for it, who sent his servant E. for that purpose. In lowering one of the bales the rope broke, through the negligence of C., in consequence of which the bale fell on E. and injured him. It was held that E. might maintain an action against B.¹ And where a person, in a transaction of common interest, assists the servants of another with the master's consent, he is usually entitled to recover against the master for injuries caused by the negligence of the servants. In *Wright v. London & N. W. R. Co.*,² a railway company contracted to carry a heifer by train to Penrith station on their line. The plaintiff traveled by the same train, and on arriving at Penrith, he, with the assent of the station master, assisted to shut the horse box, in which the heifer was, in order to hasten delivery, and while so doing was injured by the servants of the company. It was held that the company was liable. So, in a New York case,³ it was

1. *Abraham v. Reynolds*, 5 H. & N. 143; 6 Jur. N. S. 53.

A passer-by, who is casually appealed to by a workman for information respecting a thing which the latter is doing in a public thoroughfare, is not to be considered a volunteer assistant, so as to exonerate the workman's master from responsibility for an injury resulting to the former from the workman's negligent mode of doing the work. *Cleveland v. Spier*, 16 C. B. N. S. 399.

2. L. R. Q. B. Div. 252; 45 L. J. Q. B. Div. 570.

3. *Bradley v. New York Cent. R. Co.*, 3 N. Y. S. C. 288; s. c. 62 N. Y. 99.

The plaintiff was a passenger on defendant's railroad, on a car northward bound. The railway was a single track, with occasional side tracks for the passage of cars moving in opposite directions. The north bound car having been drawn beyond the side track, where it was to have met the south bound car, it became necessary to push it back to the side track, so that the cars could pass and each proceed to its destination. At the request of the

held that a person temporarily employed by the track-master of a railroad company, to clean the snow from the track, is not the servant of the company, and if injured by the negligence of the track-master, may recover damages against the company. And where a person in the employ of parties shipping lumber was requested by a railway conductor to couple a car to facilitate the loading, and was injured by the negligence of the engineer, it was held that the railway company was liable.¹

In an action for injuries to a child seven years of age, who was riding on an engine contrary to the rules of the company, and, while the engine was in motion, was told by the engineer to get off, and did so and was injured, it has been held improper to charge that if plaintiff went on the engine to ring the bell by request of the engineer, and under the engineer's promise to pay him therefor, without defendant's authority, and if plaintiff was injured by the negligence of the engineer or fireman, plaintiff, the en-

driver of the north bound car, the plaintiff assisted him in pushing the car back to the side track. While so engaged, without fault on his part, he was injured by the carelessness of defendant's driver on the south bound car. *Held*: (1) The plaintiff did not engage in the service of defendant as a mere volunteer; (2) under the circumstances the plaintiff cannot be considered as a fellow-servant with the driver of the south bound car; (3) in the case stated, the doctrine of *respondent superior* applies. *McIntyre v. Co. v. Bolton*, 43 Ohio St. 224; s. c. 21 Am. & Eng. R. R. Cas. 501.

In *Orman v. Hayes*, 60 Tex. 180, it was held that the fact that a passenger, who had considerable baggage on a train for which he had no check, alighted from the train to

assist in the transfer of the baggage, did not sever the relation of passenger and carrier, nor make him a servant of the company, he having the right to identify his property.

1. *Eason v. Sabine, etc.*, R. Co., 65 Tex. 577; s. c. 57 Am. Rep. 606.

Where a person is, by direction of the yard-master, assisting as a brakeman in the yard, without pay, and is thrown from the train by the sudden slack of the engine, which is made necessary by a defect in a brake, which has existed several months and is known to the foreman of the roundhouse, whose duty it is to repair such defect, and which is unknown to plaintiff, the railroad company is liable for the injury, thereby occasioned. *Central Trust Co. v. Texas & St. L. R. Co.*, 32 Fed. Rep. 448.

gineer, and fireman were co-employees, and the company was not liable, the doctrine having no application to the case.¹

§ 20. Compulsory Service.—

Where the service is made compulsory by law the relation does not exist. Thus, a pilot was engaged by defendants; under the compulsory clauses of the English Merchants' Shipping Act, for a voyage in a vessel of which they were owners. While giving directions on board, before the voyage commenced, the pilot was killed by the fall of a boat in consequence of the neglect of defendant's servants. In an action by the personal representatives of the deceased, it was held that there was no implied contract that the pilot should take upon himself the risk of injury by the shipowners' servants, and that the defendants were liable.²

§ 21. Minors.—Application of the Rule to.—

The fact that the servant is a minor does not affect his legal rights in this respect. He has the same rights against the master that any other person employed by him has and no more; and the master is under the same liability to him which he is under to his other servants, and no more.³ It has been maintained, however, that as the entire doctrine of co-service rests upon the contract between the employer and the employee, and as a minor is not bound by his contracts, the rule should not be

1. *Chicago M. & St. P. R. Co. v. West* (Ill.) 17 N. E. Rep. 788. 67 Ill. 498; *Ohio, etc., R. Co. v. Hammersley*, 28 Ind. 371; *Pittsburg, etc., R. Co. v. Adams*, 105 Ind. 151;

2. *Smith v. Steele*, 32 L. T. N. S., 95. s. c. 23 Am. & Eng. R. R. Cas. 408;

3. *King v. Boston & W. R. Co.*, 9 North Chicago, etc., R. Co. v. Benson, 18 Ill. App. 194; compare *Hamilton v. Galveston, etc., R. Co.*, 54 Fisk v. Central Pac. R. Co., 72 Cal. Tex. 556. 38; *Gartland v. Toledo, etc., R. Co.*,

applied to him. This reasoning, however, is fully and satisfactorily answered by the Illinois Supreme Court:¹ "It is not denied," say the Court, "that an express contract made with a minor is valid at his option. It is not void, but voidable only. The express contract by the minor, in this case, was to serve his employer on a railroad. So long as he did not avoid that contract, but remained in the employment of the railroad company, he was, of necessity, subject to all the hazards attending that kind of employment, one of which was the negligence of his fellow-servants in the same line of duty. The minor, by so entering into this employment, came under the general rule, prevailing, not only in this court, but in almost all the courts of the several States and in England, and took upon himself the natural and ordinary risks and perils incident to the service in which he engaged, among which was the carelessness of his fellow-servants."

§ 22. Illegal Employment.—Sunday Work.—Threats.—

Persons who are fellow-servants of a railway company do not, in view of the rule which affects the liability of the company to one of them who may be injured by another one, cease to be such because the work on which they were employed at the time of the injury was being done on the Sabbath. The fact that the work was not of that character allowed by law to be done on the Sabbath, does not affect the question.²

A command accompanied by a threat is a command to which an employee is not bound to submit; under the contract of service, such command does not take the plaintiff out of the general line of his employment. Thus, where one employed by a railroad company to work in a tunnel was ordered by the superintendent of the work,

1. *Gartland v. Toledo, etc., R. Co.*,
67 Ill. 498.

2. *Houston, etc., R. Co. v. Rider*,
62 Tex. 267.

under threat of dismissal, to get on a freight train for transportation to another tunnel, and in doing so he was violently cast on the ground and injured by the negligence of the engineer in starting the train, the company is not liable, the employee having received his injury through the negligence of his fellow-servant engaged in the same general employment.¹

§ 23. The Criterion of Fellow Service.—

We have seen that it is absolutely essential to the operation of the rule that the injured employee and the employee whose negligence caused the injury complained of must be servants of the same master.² But it is by no means true that all persons who are in the employ of a common master are fellow-servants of each other, in the sense that one of them is not entitled to recover from the common master for injuries caused by the negligence of another employee. Ever since the rule first enunciated in *Priestly v. Fowler* was sent upon its devious way, there has not been a court in England or this country that has maintained the contrary. All the labor of the courts since the rule was established at the outset has been in determining its principal limitations. In a previous section we have noticed some of the rules laid down by text writers and the courts by which to determine when an employee occupies the position of a fellow-servant, and how unsatisfactory they are by reason of their being stated so broadly, and in such general and comprehensive terms. The true test, it is believed, whether an employee occupies the position of a fellow-servant to another employee or is the representative of the master, is to be found, not from the grade or rank of the offending or injured servant, but it is to be determined by the character of the

1. *Capper v. Louisville, etc., R. Eng. R. R. Cas.* 524.
Co., 103 Ind. 305; s. c. 21 Am. & 2. See ante §§ 14, 15, 16, 17, 18, 19.

act being performed by the offending servant by which another employee is injured ; or in other words *whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master*. The master, as such, is required to perform certain duties, and the person who discharges any of these duties, no matter what his rank or grade, no matter by what name he may be designated, cannot be a servant within the meaning of the rule under discussion. He is an agent, and the rules of law applicable to principal and agent must apply. The liability of the master, however, for the non-performance of such duties as the law implies from the contract of service, does not rest upon the ground of guaranty of their performance, but upon the ground whether the master was negligent or not in their performance. This rule has been reiterated time and again by many of the most able courts of the country, and it is surprising how a test so obviously correct should be so frequently overlooked by law writers and Judges. In New York this has always been considered the proper test. In *Flike v. Boston & A. R. Co.*,¹ Chief Justice Church stated it clearly : "The true rule I apprehend, is to hold the corporation liable for negligence in respect to such acts and duties as it is required to perform as master, without regard to the rank or title of the agent intrusted with their performance. As to such acts the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed." And subsequently Rapallo, J., in *Crispin v. Babbitt*,² remarked : "The liability of the master is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employee performing it. If it is one pertaining to the duty the

1. 53 N. Y. 549; s. c. 13 Am. Rep. 545.

2. 81 N. Y. 516; s. c. 37 Am. Rep. 522.

master owes to his servants, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows. If the act is one which pertains only to the duty of an operative, the employee performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow-servant for its improper performance." In *Ford v. Fitchburg R. Co.*¹ a fireman on a Massachusetts railroad was injured by reason of a defect in the engine, which was due to the neglect of the employees of the company charged with the duty of keeping the engine in repair, although the company had no reason to suspect negligence or incompetency on the part of such employees, and it was held that the company was liable. In that case the Court used the following language: "The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and it is not required to assume the risk of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant." And in a recent Kansas case,² the Court said: "At common law, whenever the master delegates to any officer, servant, agent or employe high or low, the

1. 110 Mass. 240; s. c. 14 Am. Rep. 598.

2. *Atchison, etc., R. Co. v. Moore*, 29 Kan. 632.

performance of any duty which really devolves upon the master himself, then such officer, agent, servant or employe, stands in the place of the master and becomes a substitute for the master—a vice-principal—and the master is liable for his acts or his negligence.” The Supreme Court of Oregon, in a case decided in 1888,¹ after reviewing a number of authorities, openly adopt this test, saying: “The conclusion to be deduced from these and other authorities, to which reference might be made, is that the master is chargeable for any act of negligence in so far as such servant is charged with the performance of the master’s duty to his servants, such as the selection of competent servants, the furnishing of suitable tools and appliances, the providing of a reasonably safe place in which to work, and the observance of such care as will not expose the servant to hazards and perils which may be guarded against by proper diligence, etc.; and to the extent of the discharge of these duties which the master owes to his servants by the middle-man or vice-principal, the latter stands in the place of the master.” This test has also been expressly approved and adopted by other courts.² In still other jurisdictions, and these constitute

1. *Anderson v. Bennett*, 19 Pac. Co., 55 Vt. 84; s. c. 11 Am. & Eng. Rep. 765. R. R. Cas. 173; *Crispin v. Babbitt*,

2. *Gunter v. Graniteville Mfg. Co.* 81 N. Y. 516; *Flike v. Boston, etc.*, 18 S. Car. 262; s. c. 44 Am. Rep. R. Co., 53 N. Y. 549; *McCosker v.* 573; *Calvo v. Railroad Co.*, 23 S. Long Island R. Co., 84 N. Y. 77; Car. 528; *Couch v. Charlotte, etc.*, s. c. 5 Am. & Eng. R. R. Cas. 564; R. Co., 22 S. Car. 557; s. c. 28 Am. Hussey v. Coger (N. Y. 1889) 20 N. & Eng. R. R. Cas. 331; *Moon v.* East Rep. 556; *Corcoran v. Hol-* Richmond & A. R. Co., 78 Va. 745; brook, 59 N. Y. 517; *Loughlin v.* s. c. 17 Am. & Eng. R. R. Cas. 531; State, 105 N. Y. 159; *Hannibal, etc.*, Baltimore & O. R. Co. v. McKenzie, R. Co. v. Fox, 31 Kan. 586; s. c. 15 81 Va. 71; *Criswell v. Pittsburg,* Am. & Eng. R. R. Cas. 325; *Fones* etc., R. Co., (W. Va.) 33 Am. & v. Phillips, 39 Ark. 17; *Indiana Car.* Eng. R. R. Cas. 232; *Riley v. Rail-* Co. v. Parker, 100 Ind. 191; See way Co., 27 W. Va. 145; *Brown v.* also note by George W. Easley, 25 Minneapolis, etc., R. Co., 31 Minn. Am. & Eng. R. R. Cas. 515, and 553; s. c. 15 Am. & Eng. R. R. Cas. cases cited in next chapter. 333; *Davis v. Central Vermont R.*

the great majority, the criterion has clearly been applied and the cases decided with reference to it, although the courts have not stated it in general terms and announced its applicability to all cases. As it is based entirely upon the duties which the master owes the servant, these will be the subject of the next chapter in connection with their application to the fellow-servant rule.

CHAPTER III.

DUTIES OF THE MASTER—PERSON PERFORMING IS NOT A FELLOW-SERVANT.

- § 24. Duties of the Master towards his Servant.
25. Duty to Supply Proper Machinery and Appliances.
 26. When Rule as to Machinery does not Apply.
 27. Modification of the Rule—*Peschel v. Chicago, etc., R. Co.*
 28. Safe Place to Work—Stagings and Scaffolds.
 29. Railway Track and Roadbed.
 30. Same—Defences.
 31. Injuries Caused Partly by Defective Machinery and Partly by Negligence of Fellow Servant.
 32. Duty to Keep Machinery and Appliances in Repair.
 33. Illustrations and Application of the Rule.
 34. Doctrine of the English Decisions.
 35. American Cases following English Rule.
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 37. Selection and Retention of a Sufficient Number of Competent Servants.
 38. Establishment of proper Rules and Regulations.
 39. As to Inexperienced Minor Employees.
 40. As to Inexperienced Adult Employees.
 41. Where the Master Delegates Charge of Entire Business to one Person.
 42. Vice Principal doing Co-servant's Work.

§ 24. Duties of the Master towards his Servant.—

It is no answer to an action by a servant against the master for an injury caused by the master's negligence that the injury occurred in the course and conduct of the

business in which the servant was employed. For his own negligence, as we have seen, the master is responsible to his servant equally as to any other person. The servant on entering the employment of the master does not assume the risks of the master's negligence. He assumes the risk of the negligence of a co-servant; but the reason of the rule, which exempts the master from liability to one servant for the negligence of another, ceases and has no application when the master's own negligence caused the injury. The rule that the master is not liable for the negligence of a co-servant does not, however, go to the extent of exempting him from liability in every case, when it appears that he did not himself do or direct the doing of the negligent act; or even when the immediate negligence is that of a person who in some sense was the co-servant of the person injured. There are certain duties which concern the safety of the servant which belong to the master to perform, and he cannot rid himself of responsibility to his servant for not performing them by showing that he delegated the performance to another servant, who neglected to follow his instructions or omitted to do the duty intrusted to him.

The duties which the master is required to perform are :

(a) The master, whether a natural person or a corporation, although not to be held as guaranteeing the absolute safety or perfection of machinery, appliances, or other apparatus provided for the servant, is bound to observe all the care which the exigencies of the situation reasonably require in furnishing instrumentalities adequately safe for use.¹

1. *Painton v. Railroad Co.*, 83 N. Y. 521; *O'Donnell v. Allegheny R. Co.*, 59 Pa. St. 239; *Philadelphia, etc., R., Co. v. Keenan*, 103 Pa. St. 146; *Ryan v. Fowler*, 24 N. Y. 410; *etc.*, *R., Co. v. Keenan*, 103 Pa. St. 124; *Mansfield Coal Co. v. McEnery*, 91 Pa. St. 185; *Cunningham v. Union Y. 593*; *Laning v. Railroad Co.*, 49 Pac. R. Co. (Utah), 7 Pac. Rep. 795;

(b) It is the duty of a master, not only in the first instance to make reasonable efforts to supply his employes

Hough *v.* Texas, etc., Pacific R. Co., 100 U. S. 213; Sioux City, etc., R. Co. *v.* Finlayson, 16 Neb. 272; s. c., 18 Am. & Eng. R. R. Cas. 77; Dean *v.* Oceanic Steam Nav. Co., 24 Fed. Rep. 124; Mulvey *v.* Rhode Island Locomotive Works, 14 R. I. 204; Gunter *v.* Mfg. Co., 15 S. Car. 443; Houston, etc., R. *v.* Myers, 55 Tex. 110; Smith *v.* Oxford Iron Co., 42 N. J. L. 467; s. c., 36 Am. Rep. 535; Schultz *v.* Chicago, etc., R. Co., 48 Wis. 375; Little Rock, etc., R. *v.* Duffy, 35 Ark. 602; Cowles *v.* Richmond, etc., R. Co., 84 N. Car. 309; s. c., 2 Am. & Eng. R. R. Cas. 90; 37 Am. Rep. 620; McMahon *v.* Henning, 1 McCrary (U. S.) 516; Chicago & A. R. Co. *v.* Platt, 89 Ill. 141; Penn Co. *v.* Lynch, 90 Ill. 333; Chicago & A. R. Co. *v.* Mahoney, 4 Ill. App. 262; Chicago, etc., R. Co. *v.* Avery, 109 Ill. 314; s. c., 17 Am. & Eng. R. R. Cas. 649; Allerton Packing Co. *v.* Eagan, 86 Ill. 253; Houston, etc., R. *v.* Dunham, 49 Tex. 181; Hanrathy *v.* Northern, etc., R. Co., 46 Md. 280; Camp Point Mfg. Co. *v.* Ballou, 71 Ill. 417; Kielley *v.* Belcher, etc., Mining Co., 3 Sawy. (U. S.) 500; Memphis, etc., R. Co. *v.* Thomas, 51 Miss. 637; Kelly *v.* Erie Telegraph, etc., Co., 34 Min. 321; Ft. Wayne, etc., R. Co. *v.* Gildersleeve, 33 Mich. 133; Columbus, etc., R. Co. *v.* Troesch, 68 Ill. 545; Perry *v.* Ricketts, 55 Ill. 234; Toledo, etc., R. Co. *v.* Moore, 77 Ill. 217; Chicago, etc., R. Co. *v.* Jackson, 55 Ill. 492; Gibson *v.* Pac. R. Co., 46 Mo. 163; Wonder *v.* R. Co., 32 Md. 411; Beeson *v.* Green Mountain G. M. Co., 57 Cal. 20; Bowers *v.* Union Pac. R. Co. (Utah) 7 Pac. Rep. 251; Perry *v.* Marsh, 25 Ala. 659; Hayden *v.* Smithville Mfg. Co., 29 Conn. 548; Buzzel *v.* Laconia Mfg. Co., 48 Me. 113; Cayzer *v.* Taylor, 10 Gray (Mass.) 274; Snow *v.* Housatonic R. Co., 8 Allen (Mass.) 441; Holden *v.* Fitchburg R. Co., 129 Mass. 268; s. c., 2 Am. & Eng. R. R. Cas. 94; Ford *v.* Fitchburg, etc., R. Co., 110 Mass. 240; Fifield *v.* Northern R. Co., 42 N. H. 225; Harrison *v.* Central R. Co., 31 N. J. L. 293; Noyes *v.* Smith, 28 Vt. 59; Trask *v.* California So. R. Co., 63 Cal. 96; Hallower *v.* Henley, 6 Cal. 209; Houston, etc., R. Co. *v.* Marcelles, 59 Tex. 334; s. c., 12 Am. & Eng. R. R. Cas. 231; Foster *v.* Pusey (Del.), 14 Atl. Rep. 545.

The employer is not bound to employ the latest improvements in machinery, however. He is not liable for an injury which might have been avoided if such machinery had been in use. He is only bound to see that that which he does employ is safe and suitable: Disher *v.* New York, etc., R. Co., 94 N. Y. 622; 15 Am. & Eng. R. R. Cas. 233; Western, etc., *v.* Bishop, 50 Ga. 465; Wonder *v.* Baltimore, etc., R. Co., 32 Md. 411; Fort Wayne, etc., R. Co. *v.* Gildersleeve, 33 Mich. 133; Botsford *v.* Mich. Cent. R. Co., 33 Mich. 256; Devitt *v.* Pacific R. Co., 50 Mo. 302; Cagney *v.* Hannibal, etc., R. Co., 69 Mo. 416; Salters *v.* Delaware & H. C. Co., 3 Hun. (N. Y.) 338; Stack *v.* Patterson, 6 Phila. (Pa.) 225; Philadelphia, etc., R. Co. *v.* Keenan, 103 Pa. St. 124; Lake Shore, etc., R. Co. *v.* McCormick, 74 Ind. 440; s. c., 5 Am. & Eng. R. R. Cas. 474; Louisville & N. R. Co., *v.* Orr, 84 Ind. 50; 8 Am. & Eng. R. R. Cas. 94; Umbach *v.*

safe and suitable machinery, tools, etc., but also thereafter to make like efforts to keep such machinery, etc., in safe and serviceable condition; and to that end he must make all needed inspections and examinations.¹

(c) A master is bound to exercise reasonable care in selecting and retaining a sufficient number of competent servants to properly carry on the business in which the servant is employed.²

- Lake Shore & M. S. R. Co., 83 Ind. 191; 8 Am. & Eng. R. R. Cas. 98; McGinnis v. Canada S. B. Co., (Mich.) 8 Am. & Eng. R. R. Cas. 135; Nashville, etc., R. Co. v. Elliott, 1 Cold (Tenn.) 612; Ladd v. New Bedford, etc., R. Co., 119 Mass. 412; Baldwin v. Chicago, etc., R. Co., 50 Iowa 680; Atchison, etc., R. Co. v. Holt, 29 Kan. 149; Osborne v. Knox, etc., R. Co. 68. Me. 49; Dynen v. Leach, 26 L. J. (N. S.) Exch. 22.
1. Fuller v. Jewett, 80 N. Y. 46; s. c., 1 Am. & Eng. R. R. Cas. 109; Warner v. Erie R. Co., 39 N. Y. 468; Cone v. Delaware, etc., R. Co., 15 Hun (N. Y.) 172; Murphy v. Boston & A. R. Co., 59 How (N. Y.) Pr. 197; Northern Pac. R. Co. v. Herbert, 116 U. S. 642; s. c., 24 Am. & Eng. R. R. Cas. 407; Solomon R. Co. v. Jones, 30 Kan. 601; s. c., 15 Am. & Eng. R. R. Cas. 201; Gunter v. Graniteville Mfg. Co., 18 S. Car. 262; Frazier v. Pennsylvania Co., 38 Pa. St. 104; Porter v. Hannibal & St. Jo. R. Co., 71 Mo. 66; s. c., 2 Am. & Eng. R. R. Cas. 44; Long v. Pacific R. Co., 65 Mo. 225; Dutzi v. Geisel, 23 Mo. App. 676; McMillan v. Union Press Brick Works, 6 Mo. App. 434; Buzzell v. Laconia Mfg. Co., 48 Me. 113; Shanny v. Androscoggin Mills, 66 Me. 420; Johnson v. Richmond, etc., R. Co., 81 N. Car. 446; Greenleaf v. Illinois Cent. R. Co., 29 Iowa, 14; Brann v. Chicago & Rock Island R. Co., 53 Iowa, 595; s. c., 36 Am. Rep. 243; Spicer v. South Boston Iron Co., 138 Mass. 426; Moynihan v. Hills Co., 146 Mass. 586; Snow v. Housatonic R. Co., 8 Allen (Mass.) 441; Ford v. Fitchburg R. Co., 110 Mass. 241; Holden v. Fitchburg R. Co., 129 Mass. 268; s. c., 2 Am. & Eng. R. R. Cas. 94; Chicago & N. W. R. Co. v. Jackson, 55 Ill. 492; Brabbitts v. Chicago & N. W. R. Co., 38 Wis. 289.
2. Harper v. Indianapolis & St. L. R. Co., 44 Mo. 488; Kersey v. Kansas City, etc., R. Co., 79 Mo. 362; s. c., 17 Am. & Eng. R. R. Cas. 638; Moss v. Pacific R. Co., 49 Mo. 167; Huffman v. Chicago, etc., R. Co., 78 Mo. 50; s. c., 17 Am. & Eng. R. R. Cas. 625; Booth v. Boston, etc., R. Co., 73 N. Y. 38; Mentzer v. Armour, 18 Fed. Rep. 373; Satterly v. Morgan, 35 La. Ann. 1166; East Tenn., etc., R. Co. v. Gurley, 12 Lea (Tenn.) 46; s. c., 17 Am. & Eng. R. R. Cas. 568; Indiana Mfg. Co. v. Milliken, 87 Ind. 87; Crandall v. McIlrath, 24 Minn. 127; Delaware, etc., Canal Co. v. Carroll, 89 Pa. St. 374; Tyson v. North Alabama R. Co., 61 Ala. 554; McDonald v. Hazeltine, 53 Cal. 35; Chicago, etc., R. Co. v. Doyle, 18 Kan. 58; Summerhays v. Kansas Pac. R. Co., 2 Colo. 484; Chapman v. Erie R. Co., 55 N. Y. 579; Sizer v. Syracuse, etc., R. Co., 7 Lans. (N. Y.) 67.

(*d*) It is the duty of the master to make and publish such regulations or provisions for the safety of employes as will afford them reasonable protection against the dangers incident to the performance of their respective duties.¹

(*e*) It is the duty of the master who knowingly employs a youthful or inexperienced servant, and subjects him to the control of another servant, to see that he is not employed in a more hazardous position than that for which he was employed, and to give him such warning of his danger as his youth or inexperience demands.²

§ 25. Duty to Supply Proper Machinery and Appliances.—

The master, whether a natural person or a corporation, is obliged not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence on the part of the master. "To that end he is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with machinery or other instru-

1. *Lake Shore & M. S. R. Co. v. Lavalley*, 36 Ohio St. 222; s. c., 5 Am. & Eng. R. R. Cas. 549; *Chicago, etc., R. Co. v. George*, 19 Ill. 510; *Pittsburg, etc., R. Co. v. Powers*, 74 Ill. 341; *Chicago, etc., R. Co. v. Taylor*, 69 Ill. 461; s. c., 18 Am. Rep. 626; *Chicago, etc., R. Co. v. McLallen*, 84 Ill. 109; *Crew v. St. Louis, etc., R. Co.*, 20 Fed. Rep. 87; *Flike v. Boston & A. R. Co.*, 53 N. Y. 549; *Abel v. Delaware & H. Canal Co.*, 103 N. Y. 581; s. c., 28 Am. & Eng. R. R. Cas. 497; *Besel v. New York Cent. & H. R. R. Co.*, 70 N. Y. 171; *Haskin v. Railroad Co.*, 65 Barb. (N. Y.) 129; *Wright v. New York Cent. R. Co.*, 25 N. Y. 562; *Rose v. Boston & A. R. Co.*, 58 N. Y. 217; *Vose v. Lancashire, etc., R. Co.*, 2 H. & N. 728; *Kansas Pac. R. Co. v. Salmon*, 14 Kan. 512; *Baltimore & Ohio R. Co. v. Woodward*, 41 Md. 268; *Cooper v. Iowa Cent. R. Co.*, 44 Iowa, 134. 2. *Fort v. Union Pac. R. Co.*, 2 Dill (U. S.) 259; *Union Pac. R. Co. v. Fort*, 17 Wall. (U. S.) 553; *Dowling v. Allen*, 74 Mo. 13; s. c., 41 Am. Rep. 298; *Allen v. Burlington, etc., R. Co.*, 57 Iowa, 623; *Grizzle v. Frost*, 3 F. & F., 622; *Hill v. Gust*, 55 Ind. 45; *Siegel v. Schautz*, 2 T. & C. (N. Y.) 353. Compare *O'Connell v. Adams*, 120 Mass. 427; *Anderson v. Morrison*, 22 Minn. 274; *Combs v. New Bedford Cordage Co.*, 102 Mass. 572; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Lalor v. Chicago, etc., R. Co.*, 52 Ill. 401. See note by Geo. W. Easley, 25 Am. & Eng. R. R. Cas. p. 519.

mentalities adequately safe for use by the latter. It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation, among which is the carelessness of those, at least in the same work or employment, with whose habits, conduct, and capacity he has, in the course of his duties, an opportunity to become acquainted, and against whose neglect or incompetency, he may himself take such precautions as his inclination or judgment may suggest. But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk, for the obvious reason that the servant who is to use the instrumentalities provided by the master has, ordinarily, no connection with their purchase in the first instance, or with their preservation or maintenance in suitable condition after they have been supplied by the master."¹

1. Harlan, J., in *Hough v. Texas & P. R. Co.*, 100 U. S. 213. In considering what dangers the servant is presumed to risk, the Supreme Court of the United States said, in *Union Pac. R. Co. v. Fort*, 17 Wall. (U. S.) 553: "But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparations to an employe in a subordinate position for any injury caused by the wrongful con-

duct of the persons placed over him, whether they were fellow-servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employes of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they fail to do it. A doctrine that leads to such results is

The rule of law, then, which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable machinery and instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it.¹ They are charged with

unsupported by reason, and cannot receive our sanction." To effect that servant does not run risk of defective machinery, see *ante*, § 24.

1. *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Ackerson v. Dennison*, 117 Mass. 407; *Killea v. Faxon*, 125 Mass. 485; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441; *Hough v. Texas & Pac. R. Co.*, 100 U. S. 213; *Davis v. Central Vermont R. Co.*, 55 Vt. 84; s. c., 11 Am. & Eng. R. R. Cas. 173; *Noyes v. Smith*, 28 Vt. 59; *Cumberland, etc., R. Co. v. State*, 44 Md. 283; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Bowers v. Union Pac. R. Co. (Utah)*, 7 Pac. Rep. 251; *Cunningham v. Union Pac. R. Co. (Utah)*, 7 Pac. Rep. 795; *Bushby v. New York, L. E. & W. R. Co.*, 107 N. Y. 374; *Booth v. Boston, etc., R. Co.*, 67 N. Y. 593; *Stringham v. Stewart*, 100 N. Y. 516; *Pantzar v. Tilly Foster Min. Co.*, 99 N. Y. 368; *Laning v. New York Cent. R. Co.*,

49 N. Y. 521; *Brickner v. New York Cent. R. Co.*, 2 Lansing (N. Y.) 506; affirmed by Court of Appeals, 49 N. Y. 672; *Ryan v. Fowler*, 24 N. Y. 410; *Atchison, etc., R. Co. v. Moore*, 29 Kan. 632; s. c., 11 Am. & Eng. R. R. Cas. 243; *Atchison, etc., R. Co. v. McKee*, 37 Kan. 592; *Houston, etc., R. Co. v. Marcelles*, 59 Tex. 334; s. c., 12 Am. & Eng. R. R. Cas. 231; *Houston, etc., R. Co. v. Rider*, 62 Tex. 267; *Mitchell v. Robinson*, 80 Ind. 281; s. c., 41 Am. Rep. 812; *Krueger v. Louisville, etc., R. Co.*, 111 Ind. 51; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 272; s. c., 18 Am. & Eng. R. R. Cas. 77.; *Wells v. Coe*, 9 Colo. 159; *Mulvey v. Rhode Island Locomotive Works*, 14 R. I. 204; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Patterson v. Pittsburgh, etc., R. Co.*, 76 Pa. St. 389; *Philadelphia, etc., R. Co. v. Keenan*, 103 Pa. St. 124; *O'Donnell v. Allegheny V. R. Co.*, 59 Pa. St. 239; *Smith v. Ox-*

the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one the master cannot escape the consequence of the agent's negligence; if the servant is injured in the other he may.

A leading case upon this subject is that of *Davis v. Central Vermont R. Co.*¹ It is there held that in an action on behalf of a fireman on a railway company, killed by the washing out of a culvert, the negligence of the company's bridge-builder in constructing, and of the road-master in repairing the culvert, is attributable to the company, Ross, J., saying: "The doctrine now established by the United States Supreme Court, and by most of the courts of last resort of the several States, holds the master liable to his workmen for injuries sustained from the negligent performance of duties which rest by the relation upon the master, whether the master performs such duties personally or through an agent or servant. * * * The master's liability has been made to rest upon whether the negligence arose in the performance of a duty for the

ford Iron Co., 42 N. J. L. 467; s. c., 36 Am. Rep. 535; *Foster v. Pusey* (Del.) 14 Atl. Rep. 545; *Schultz v. Chicago, etc., R. Co.*, 48 Wis. 375; *Trask v. California R. Co.*, 63 Cal. 96; *Halloway v. Henley*, 6 Cal. 209; *Peschel v. Chicago, etc., R. Co.*, 62 Wis. 338; *Beeson v. Green Mountain Gold Mining Co.*, 57 Cal. 20; *Cowles v. Richmond, etc., R. Co.*, 84 N. Car. 309; s. c., 2 Am. & Eng. R. R. Cas. 90; *Savannah, etc., R. Co. v. Goss* (Ga.), 5 S. E. Rep. 777; *Chicago, etc., R. Co. v. Avery*, 109 Ill. 314; s. c., 17 Am. & Eng. R. R. Cas. 649; *Chicago, etc., R. Co. v. Jackson*, 55 Ill. 492; *Columbus, etc., R. Co. v. Troesch*, 68 Ill. 545; *Memphis & C. R. Co. v. Thomas*, 51 Miss. 637; *Kelly v. Erie Telegraph & Tel. Co.* 34 Minn. 321; *Gibson v. Pacific R. Co.*, 46 Mo. 163; s. c., 2 Am. Rep. 497; *Covey v. Hannibal, etc., R. Co.*, 86 Mo. 635; s. c., 28 Am. & Eng. R. R. Cas. 382; *Whalen v. Centenary Church*, 62 Mo. 326; *Patterson v. Wallace*, 1 Macq. H. L. Cas. 748; *Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266; *Clarke v. Holmes*, 7 H. & N. 937; *Murphy v. Phillips*, 35 L. T. (N. S.) 477. 1. 55 Vt. 84; s. c., 11 Am. & Eng. R. R. Cas. 173.

careful discharge of which he became responsible when he assumed the relation of master to the injured servant."

Under this rule it has been held that the agents of a railroad company intrusted with the duty of purchasing a locomotive, are not to be regarded as the fellow-servants of those operating it.¹ Also that a railroad company is liable to an employe for an injury received by him in consequence of the unskillful, improper, and negligent manner in which the company constructed its road. In such a case the rule exempting the master from liability for an injury to a servant for an injury to a fellow-servant has no application.² In Illinois, also, it is held that care in supplying safe instrumentalities in the doing of the work undertaken by the servant is a duty the master owes to the servant, and when the performance of that duty is devolved upon a fellow-servant the master's responsibility in respect of that duty still remains. In such case the negligence of the fellow-servant is the master's neglect of duty.³

§ 26.—When the Rule as to Machinery does not Apply.—

To hold the master responsible for unsafe machinery furnished for the use of an employe, however, it must be placed in his hands for use. This is illustrated by a

1. *Cumberland, etc., R. Co. v. State*, 44 Md. 283.

2. *Trask v. California So. R. Co.*, 63 Cal. 96. See *infra* § 29.

3. *Chicago, etc., R. Co. v. Avery*, 109 Ill., 314; s. c., 17 Am. & Eng. R. R. Cas. 649.

In an action by a wife, for damages for the death of her husband, occurring in the employment of the defendant, it appeared that the death was caused by a fire originating from a defective pipe put up under the supervision of the defendant's superintendent; and it did not appear that the deceased

knew, or had reason to know, of the defect. *Held*, that the superintendent was not a fellow-employe of the deceased in the sense intended by § 1970 of the Cal. Civil Code; and that the work of putting up the pipe, being done under his supervision, was the same as though done by him in person; that the deceased had the right to rely upon the implied engagement of the defendant that the pipe was properly placed and constructed, and that the defendant was therefore liable. *Beeson v. Green Mountain Gold Mining Co.*, 57 Cal. 20.

recent New York case,¹ which was an action to recover damages for alleged negligence causing the death of M., plaintiff's intestate. It appeared that M. was employed as a mechanic in defendant's repair shop. By the rules of the shop, known to all the employes, when a locomotive was sent to the shop for repairs, aside from repairing defects reported, a thorough examination was required to be made, to discover and repair other defects, if any. The ordinary course of business was to put the locomotive into the hands of the boiler-makers for examination and repairs, then into the hands of machinists, and finally it was turned over to mechanics to set the safety-valves; this last work was usually committed to M. and another. While they were engaged in setting the safety-valve of a locomotive which had passed through this course, the boiler exploded and M. was killed. The explosion was caused, as the evidence tended to show, by defects in the boiler, which would have been discovered had the boiler-makers performed their duty. Those employed in the shop were competent and skillful mechanics: they had reported to the master-mechanic that the locomotive was "all right." The Court held that plaintiff was properly nonsuited, as the death of M. was caused by the negligence of his co-servants; that the case was not within the principle holding the master responsible for unsafe machinery furnished for the use of the employe, as the locomotive was not placed in his hands for use. Where the defective appliance which caused the injury was constructed by a servant no part of whose employment it was to construct such appliances for any body but himself, there can be no recovery. Thus, the owner of a building is not liable to a mason employed by him for injuries occasioned by the defective construction of a

1. *Murphy v. Boston & A. R. Co.*, R. Cas. 510.
88 N. Y. 146; s. c. 8 Am. & Eng. R.

ladder by a carpenter also employed by him, it being no part of the carpenter's employment to make ladders for the use of other workmen than himself.¹ It has also been held that a building contractor who has provided safe and suitable machinery is not liable for a personal injury to an employe occasioned by co-employes' errors or negligence in selecting the particular appliances; as, portions of a derrick employed in setting stone.²

The doctrine is also modified in respect to cars which one railroad company receives from another for transportation over its road, and it is the general rule that where one company receives a car from another company to be run over its road, it is not bound to test the safety of the car for its servants, but may assume its safety unless the contrary appears.³

§ 27.—Modification of the Rule.—*Peschel v. Chicago, etc., R. Co.*—

In Wisconsin, while the rule stated in the preceding section is fully recognized, there is a distinction made

1. Mercer v. Jackson, 54 Ill. 397.

In a recent Iowa case it appeared that the plaintiff was a laborer at work in defendant's stone quarries. He was injured while attempting to ride down an incline on a tram car owing to a defective appliance. Although the tramway was incomplete, the men arranged a temporary plan for running the car under the direction of a certain laborer, who had charge of the tools and kept the time of the men and sometimes gave them directions, but was in general a mere laborer, having no power to govern the construction of the machinery or to purchase or select appliances. The Court held that such a laborer could not be considered as a vice-principal, but was a fellow-servant of the injured

employe. *Wilson v. Dunreath Red Stone Quarry Co.*, (Iowa 1889) 42 N. W. Rep. 360.

2. Harms v. Sullivan, 1 Ill App. 251; see also § 27 for discussion of point involved in this case.

3. Ballou v. Chicago, etc., R. Co., 54 Wis. 269; s. c. 5 Am. & Eng. R. R. Cas. 480; Baldwin v. Chicago, etc., R. Co., 50 Iowa 680; Michigan Cent. R. Co. v. Smithson, 45 Mich. 212; Smith v. Flint, etc., R. Co., 46 Mich. 258; Mackin v. Boston, etc., R. Co., 135 Mass. 201.

Compare *Gutridge v. Missouri Pac. R. Co.*, (Mo.) 13 West Rep. 644; *Sawyer v. Minneapolis, etc., R. Co.*, 38 Minn. 103; s. c. 33 Am. & Eng. R. R. Cas. 394; *O'Neil v. St. Louis, etc., R. Co.*, 9 Fed. Rep. 337.

between those machines or appliances which are made and put up for doing work in the machine shop of the master, and those which are built and put up where it is to be used by the servant. In the late case of *Peschel v. Chicago, Milwaukee & St. P. R. Co.*,¹ the following facts appeared: The plaintiff, a mason employed with other masons, carpenters and sectionmen in the erection of a water tank and wind-mill for the defendant railroad company, was injured by the falling of a portion of the framework for the wind-mill, which he was assisting to raise. The apparatus for raising such framework consisted of a windlass or crab, tackle-blocks, ropes, the water-tank itself, and an anchor post set in the ground about sixty feet distant, all of which had been placed in position and adjusted under the direction of the foreman. The fall of the framework was caused by the giving way of the anchor-post, which had not been set in the ground to a sufficient depth. The Court, Chief Justice Cole writing the opinion, held, that the whole apparatus for hoisting could not be considered as a single machine which the defendant was bound to furnish adjusted and in position to do the work, but the placing and adjustment of the detached appliances were a part of the work to be done. The injury was caused, therefore, not by any failure of the defendant to furnish proper and safe machinery or appliances, but by the negligence of the foreman in the management of such appliances, who was a fellow servant of the plaintiff. The Chief Justice explained his position as follows: "I see no sufficient reason for saying the defendant was under obligation to furnish the men employed to erect the water tank and wind-mill with a machine or instrumentality for raising the bents in a complete condition ready for use. There is no claim that the materials and appliances provided were not suitable and sufficient

1. 62 Wis. 338.

for the purpose intended. They were in a detached condition, and necessarily had to be adjusted on the ground; but the defendant did not contract with the plaintiff that these various appliances should be adjusted and put in order fit for use before he went to work. On the contrary, it was what the foreman, Brooks, with his gang of men, including the plaintiff, was employed to do, to take the materials of stone and wood, and all other appliances, and build the piers, construct the tank, frame the bents, adjust the machinery, and hoist the bents to their proper position. All this labor was necessarily involved in what they undertook to do and were paid for doing. It is unsound reasoning to compare this hoisting apparatus to a steam engine, a railroad car, or to some machine which is all adjusted so that its sufficiency can be ascertained before the servant is called upon to use it. Here the materials had to be prepared and put together, frames made, and hoisting apparatus adjusted—which included the setting of the anchor-post—by the men themselves; and to use the forcible and pertinent language of defendant's attorneys on this point, if placing the post in the ground, in this particular case, was a duty which the master owed to the servant, then in doing work of this kind, the rule as to non-liability for the negligent acts of fellow-servants would be practically nullified. If in the adjustment of this machinery a pulley, although perfect in itself, had been improperly placed or secured; if the anchor-rope, although proper and sufficient in itself, had been insecurely tied to the post and slipped therefrom; if one of the men, furnished with a proper crowbar, had negligently held it at the foot of the bent; if the framework, made by the men themselves, in the shape of timbers underneath the bents, and upon which they rested, had been improperly made,—the logic of the position of plaintiff's counsel would make the master liable in all the cases sup-

posed for an injury caused by such negligence of a fellow-servant. This is, indeed, extending the liability of the master further than the adjudications of this court have carried it, and further than the law will warrant."

Justice Taylor wrote a very vigorous dissenting opinion. He maintained that the liability of a master to his servant for injuries caused by his neglect in furnishing safe and suitable machinery for doing the work, or with which the servant may come in contact in doing the work, is the same, whether the machinery be made and put in shape for doing the work in the machine shop of the master, or upon the ground where it is to be used by the servants. In either case he was of opinion that the master is not liable for an injury to a servant which happens *while he is employed in the construction of the machine* through the negligence of a fellow-servant employed in the same work. But if the servant is injured while using the machine, *after its construction is completed*, by reason of any negligence in its construction of which he was himself not guilty and of which he had no knowledge, the master is liable.

This position appears to the writer to be unassailable. The evidence in the case did not show that the plaintiff was employed to assist in setting up the hoisting machine, but it was shown very clearly that he was not called upon to assist in any manner in that work. When the machine was put in use; therefore, to assist in doing the work, the employes of the company, except those only who were guilty of contributory negligence in preparing the machine for use, had the right to suppose that the company had used due care in preparing the same for use. How can it make any difference where a machine is constructed so that it is furnished by the employer for the use of his servants, and the injured servant had nothing to do with the construction of it? The instances cited by the court of possible

slight defects in the machine for which the master would be liable, if the doctrine of the plaintiff was to prevail, might very properly render him so if they were errors negligently made in construction and thereby rendered the machine unsafe.¹ A few other courts have apparently taken the same position as that assumed by the Winconsin Court in this case, notably as to injuries caused by defective scaffolds and stagings, which will be considered in the next section.

1. Justice Taylor, in his dissenting opinion, said: "The learned counsel for the appellants * * * * * seek to distinguish this case from the almost numberless cases sustaining the rule of this court, by urging, that in this case, the persons who were employed to build the tank and wind-mill were also employed to assist in constructing, or at least in setting up and putting in position for work, the hoisting apparatus or machinery which they were to use in raising the tower. To my mind, this cannot alter the liability of the master, except, perhaps, as to such of the servants as were guilty of negligence in assisting in putting the hoisting machine together or in place.

"It is well known that the setting up or putting together the parts of a machine so as to constitute a working machine, is a work which requires almost, if not quite as much skill, judgment, and knowledge of mechanical forces as the making of the different parts; and the ordinary laborer or workman is not expected to have the knowledge necessary for such work. It must be admitted that the setting of the post which was to sustain all the force necessary to raise the heavy

timbers of the tower, by means of blocks, tackle, and crab, was a matter which required expert knowledge. It required a knowledge of the weight to be raised, the direction in which the force was to be applied in raising the timbers, and all other circumstances which might affect the power to be applied. The foreman was the representative of the company to see that this work was properly done. He is supposed to have the necessary knowledge and skill to do that work well. Supposing the railroad company had entrusted that work to a person having no mechanical experience whatever, and he had placed the post as it was in this case, and it had given way when the weight was put upon it: this court would not have hesitated to declare that the company was negligent in entrusting the work to an incompetent man. How, under the rule of this court, can the company excuse itself, if its agent, who is competent to do the work entrusts the doing of it to an incompetent person, who fails for want of knowledge or skill to do it well? If he directed it to be set by an incompetent person, without giving orders how it should be set, and such incompetent person

§ 28. Same—Safe Place to Work—Stagings and Scaffolds.—

In many cases at common law, a master assumes the duty towards a servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, and "whenever the master delegates to any officer, servant, agent, or employe the performance of this duty, then such officer, servant, agent, or employe stands in the place of the master, and becomes a substitute for the master—a vice principal—and the master is liable for his acts or his negligence."¹ This rule finds frequent

did the work imperfectly, from want of skill and judgment, then even such person, much less the other employes, who had no hand in doing the work, would be guilty of no culpable negligence, and if injury happened to him from his unskillful work, the real culpability would rest upon the foreman, who directed him to do a work he was incompetent to perform and without instructing him how to perform it. The case would come within the rule which requires the master, when he set the servant, who is unskilled in the business, at work in a dangerous place, to inform him of the dangers attending his work and give him the proper instruction how to avoid such danger. If the foreman gave the person or persons doing the work the proper instructions, and they failed to follow such instructions, and an injury was sustained by any of those employed in such work, by reason of their neglect to follow instructions, they could not recover, because their negligence contributed to their injury; but this would not apply to the other workmen who were not engaged in setting the work.

"The foreman did not perform his

whole duty by directing the work to be done by others, although he gave the proper instructions. It was his further duty to inspect the work while it was being done, to see that it was properly done and in a safe condition to be used for the purposes for which it was intended; and when the machine was put in use to assist in doing their work, the employes of the company, except those only who were guilty of culpable negligence in preparing the machine for use, had the right to suppose that the company had used due care in preparing the same for use."

1. *Atchison, etc., R. Co. v. Moore*, 29 Kan. 632; s. c., 11 Am. & Eng. R. R. Cas. 243; *Whalen v. Centenary Church*, 62 Mo. 326; *Hannibal, etc., R. Co. v. Fox*, 31 Kan. 587; s. c., 15 Am. & Eng. R. R. Cas. 325, holding that a boss car-repairer is not a fellow-servant of his subordinate. See to same effect *Moore v. Wabash, etc., R. Co.*, 85 Mo. 588. The Supreme Court of Oregon, in the case of *Anderson v. Bennett* (Oregon, 1888), 19 Pac. Rep. 765, say: "It is the duty which the master owes to every servant to provide a reasonably safe place in which to work; and, al-

application in those cases where an employe is injured by reason of a defective staging or scaffold. Thus A. was dumping bricks upon a scaffold, when it fell and he was injured. The Supreme Court of New York held that the man who built the scaffold was not A.'s fellow-workman in such a sense that A. could not hold his master liable for his injuries; that it was the master's business to provide a suitable scaffold for A to work on; and that the fact that the scaffold gave way, was *prima facie* evidence of negligence.¹ In another case² plaintiff was injured by the fall-

though he is not an insurer, he is bound on the same principle by the law to exercise due and proper care in this regard, as he is in hiring competent servants, or in supplying reasonably safe machinery or other instrumentalities for the use of his servants. This is regarded as a personal or absolute obligation; and if the discharge of this obligation is entrusted to a servant, such servant is the representative of the master, and any negligence on his part is the negligence of the master. The servant has a right to rely on the master's performance of this duty, and his omission to take due care in this respect, whereby injury results to his servant, will be included among the risks which he assumes, and for which he is liable." Of course, where the place in which the work is done is openly and obviously defective, the employe runs the risk.

1. *Green v. Banta*, 48 N. Y. Sup. Ct. 156. The case of *Manning v. Hogan*, 78 N. Y. 615, was the case of a defective scaffold. The building was a large public building, and the evidence showed that the putting up of scaffolds for such building was a work which required skilled

labor or experts in that business, and it was held that the master was liable to one of his employes for an injury received from a defect in the scaffold, notwithstanding the master had furnished suitable materials for the construction thereof. Chief Justice Taylor, in commenting on this case in *Peschel v. Chicago, etc., R. Co.*, 62 Wis. 361, says: "The decision does not turn upon the point that the master himself was present directing the erection of the scaffold, as the facts stated show he was not; but upon the facts that the scaffold, under the evidence in that case, was a work that required skilled labor, the same as in making a machine or tool for the use of the employe, and that the persons who built the scaffold were not skilled in that business, and therefore the master was liable for the negligence of the co-employe engaged in the construction of the same." See also *Ackerson v. Dennison*, 117 Mass. 407; *Whalen v. Centenary Church*, 62 Mo. 326.

2. *Kelly v. Erie Tel., etc., Co.*, 34 Minn. 321. In a recent Circuit Court case it appeared that plaintiff, under the direction of defendant's foreman, put up a staging about 28 feet high,

ing of one of defendant's telegraph poles at a time when he was in the employ of defendant and at work upon the top of the pole. The performance of defendant's duty, to see that its poles were set deep enough to enable its employes to climb safely, was intrusted to a foreman, and plaintiff had nothing to do with that part of the work, except, when in particular instances, he was so directed by the foreman. The Supreme Court of Minnesota held that the negligence of the foreman in the premises was, as between plaintiff and defendant, negligence of defendant.

In Massachusetts, while the above rule is recognized, yet it has been held not to apply in two recent cases where it is somewhat difficult to see the reason for it. In *Killea v. Paxon*,¹ it appeared that F. employed H., a carpenter, to superintend the entire job of repairing a building, and directed him to erect a staging, which was solely for putting on the gutters. In doing so, H. insecurely fastened the brackets to the building. On the next day F. ordered

firmly nailing the two planks which constituted the floor. During his absence another workman, under directions of the foreman, removed one of the planks, placing another in its place without fastening it. Plaintiff, not knowing that any change had been made, returned to his work on the staging, which let him fall to the ground. *Held*, that not the failure of the plaintiff's fellow workman to nail the plank which replaced the nailed one, but the act of the foreman in misleading plaintiff into danger, was the cause of the injury, for which defendant was liable. *Heckman v. Mackey*, 35 Fed. Rep. 353, decided upon the authority of *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377.

1. 125 Mass. 485.

In another Massachusetts case it appeared that B. and S., agents

for a religious society, contracted with N. to paint the inside of a church for a gross sum. The society undertook to erect a staging to be used by N., and through S. and D. employed C., a carpenter, for a gross sum, and not subject to the society's control, to furnish the material and labor therefor. N. could not know, from examining the staging, whether it was or was not strong enough for his workmen to go upon. The staging, being defective, fell, injuring M., one of N.'s workmen. *Held*, (1) That the society was liable to M. for the injury, having accepted the staging and induced N.'s workmen to come thereon; (2) that M. could not maintain an action jointly with B. and S. for the injury. *Mulchey v. Methodist Religious Society*, 125 Mass. 487.

copper gutters of a coppersmith, and directed him to send a man to put them on. K. was accordingly sent, and was directed by H. where to go on the staging. The staging fell and injured K. The court held that, on proof of these facts, K. could not maintain an action against F. for the injury, the same being the result of the negligence of the carpenter, K.'s fellow-servant. Morton, J., said: "There was no evidence which would justify the jury in finding that either of the defendants undertook to furnish a staging for the plaintiff or to assume the risk of its safety. It was like the ordinary case, where a man, in building or repairing a house, employs various servants in different departments of labor. Neither of the defendants retained any charge or direction of the work of putting up the staging, but entrusted it to Higgins. He and the plaintiff were fellow-servants employed in the same service, and each took the risk of the negligence of the other. It is not contended that there was any evidence on the part of the defendant in the employment of Higgins, it appearing that he was a skillful and competent carpenter. It follows that the plaintiff has proved no negligence for which the defendants or either of them are responsible."

So also in an Iowa case, a carpenter sued a contractor and his employer, on account of an injury received by falling from a defective scaffold. It appeared that the scaffold was erected by a fellow-servant, the defendant not being present, and there being no evidence that the defendant was negligent in the employment of unskilled workmen, or in failing to furnish suitable materials with which to erect the scaffold, it was held that no recovery could be had, and that the trial court properly directed a verdict for defendant.¹

But the foreman of a gang of men engaged in constructing a shed, who works together with them and has no

1. *Benn v. Null*, 65 Iowa, 407.

authority to throw away old scaffolding and obtain new without special orders, is a fellow-servant with the other men in his gang, and the employer is not responsible accordingly for an injury to one of these occasioned by a defect in a board taken and received by such foreman for the erection of a scaffold.¹ But where the duty of the master does not include the building of the staging, but ends with the supply of material, it is held, in some jurisdictions, that the negligence of the injured employe's fellow-servant in selecting defective timber, not working under the superintendence of the employer or his agent, is not the negligence of the master, although it is true that the exercise of due care in selecting men and materials will not always satisfy the obligation assumed. Thus, in an action by C. against his employer, for personal injuries caused by the fall of a staging, occasioned by the defective material of the putlog thereunder, where it appeared that the materials were selected by C.'s fellow-workmen from a mass furnished by the defendant, the jury were instructed that C. could not recover unless the jury were satisfied that the defendant did not exercise reasonable care in the selection of men and materials to erect the staging; or also, if suitable materials were furnished, and a fellow-workman, not under the superintendence of the defendant or his agent, selected a defective putlog. The court decided that C. had no ground of exception.² Where a workman is injured by falling from a scaffold negligently constructed by himself and his co-laborers, the master is clearly not liable.³

1. *Willis v. Oregon Ry. & N. Co.*, R. Co., 95 Mo. 268.
11 Oregon 257; s. c., 17 Am. & Eng. R. R. Cas. 539. 3. *Hogan v. Field*, 44 Hun (N. Y.) 72. To same effect see *Bowen v. Chicago, etc.*, R. Co., 95 Mo. 268.
2. *Colton v. Richards*, 123 Mass. 484; and see *Bowen v. Chicago, etc.*,

§ 29. *Same.*—**Railway Track and Roadbed.**

Negligence in keeping the roadway of a railroad in a safe and suitable condition is negligence which, as between an employe injured thereby and the company, is chargeable upon the company. It has accordingly been held that where a railroad company permitted its track to be encumbered with sticks and blocks of wood at places where a fireman was called upon to perform his duties in coupling cars, by reason of which he was injured, the negligence in thus permitting the roadway to be obstructed was that of the company, and not merely that of a co-employe of the fireman, who was charged with the duty of keeping the track clear.¹ And where, immediately preceding the injury complained of, section-hands employed by a railroad company dig away the earth around a switchrod so as to leave a cavity, in consequence of which a brakeman, in the discharge of his duty in uncoupling cars, is injured, these section-hands were not considered fellow-servants of the brakeman in such a sense as to relieve the company from liability for the injury, but their act was taken to be as the act of the company.²

In a recent Virginia case³ an action was brought to recover damages against a railroad company for the negligent killing of a brakeman on a material train. It was shown that the immediate cause of the brakeman's death was the rapid running of the train, suddenly accelerated

1. *Hullehan v. Green Bay, etc., R. Co.*, 68 Wis. 520; s. c., 31 Am. & Eng. R. R. Cas. 322; Taylor, J. said: "Whatever may be the rules of other courts upon this point, we think the following cases in this court settle the rule against the contention of the learned counsel: *Smith v. Railway Co.*, 42 Wis. 520; *Brabbitts v. Railway Co.*, 38 Wis. 289; *Wedgwood v. Railway Co.*, 41 Wis. 478; *Schultz v. Railway Co.*, 48 Wis. 375; *Dorsey v. Phillips, etc., Co.*, 42 Wis. 583; *Bessex v. Railway Co.*, 45 Wis. 479. And my individual opinion is that the rule as stated in the cases above cited is sustained by the great weight of authority in this country."

2. *Vautrain v. St. Louis, etc., R. Co.*, 8 Mo. App. 538.

3. *Torians v. Richmond & A. R. Co. (Va.)* 4 S. East Rep. 339.

by putting on additional steam, over a track left in an uneven and weakened condition by other employes of the defendant company, whose duty it was to repair the track in question and who failed to give warning of the dangerous condition of the road. The Court of Appeals held that the negligence of such employes was the negligence of the company, and that plaintiff's intestate was not a co-employee. Cases of this kind might be multiplied, but it is sufficient to say that the rule is sustained by the great weight of authority in this country.¹

In Mississippi this doctrine is not accepted. In a leading case in that State the Supreme Court said: "It

1. *Chicago & N. W. R. Co. v. Sweet*, 45 Ill. 201; *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183; *Hall v. Missouri Pac. R. Co.*, 74 Mo. 298; s. c., 8 Am. & Eng. R. R. Cas. 106; *Lewis v. St. Louis, I. M. & S. R. Co.*, 59 Mo. 495; s. c., 21 Am. Rep. 385; *Vautrain v. St. Louis, etc., R. Co.*, 8 Mo. App. 538; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441; *Moon v. Richmond & A. R. Co.*, 78 Va. 745; s. c., 17 Am. & Eng. R. R. Cas. 531; *Torians v. Richmond & A. R. Co. (Va.)*, 4 S. East. Rep. 339; *Baltimore, etc., R. Co. v. McKenzie (Va.)*, 24 Am. & Eng. R. R. Cas. 395; *Hullean v. Green Bay, etc., R. Co.*, 68 Wis. 520; s. c. 31 Am. & Eng. R. R. Cas. 322; *Houston, etc., R. Co. v. Dunham*, 49 Tex. 181; *Davis v. Cent. Vt. R. Co.*, 55 Vt. 84; s. c. 45 Am. Rep. 490; 11 Am. & Eng. R. R. Cas. 173; *Calvo v. Charlotte, etc., R. Co.*, 23 S. Car. 526; s. c. 28 Am. & Eng. R. R. Cas. 327; *Brinckman v. South Car. R. Co.*, 8 S. Car. 172; *St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 412; s. c. 28 Am. & Eng. R. R. Cas. 341; *Atchison, etc., R. Co. v. Moore*, 29 Kan. 633; 31 Kan. 197; s. c. 11 Am. & Eng. R. R. Cas. 243; 15 Am. & Eng. R. R. Cas. 312; *Kansas City, etc., R. Co. v. Kier*, (Kan. 1889) 21 Pac. Rep. 770; *Drymala v. Thompson*, 26 Minn. 40; *Colorado Cent. R. Co. v. Ogden*, 3 Colo. 499; *O'Donnell v. Allegheny V. R. Co.*, 59 Pa. Stat. 239; *Patterson v. Pittsburgh & C. R. Co.*, 76 Pa. St. 389; *Louisville & N. R. Co. v. Bowles*, 9 Heisk (Tenn.) 866; s. c. 1 Alb. L. J. 119; *Hardy v. Carolina Cent. R. Co.*, 76 N. Car. 5; *Central R. Co. v. Mitchell*, 63 Ga. 173; s. c. 1 Am. & Eng. R. R. Cas. 145. If the duty of keeping a bridge in repair is entrusted by the company to its foreman, his negligence is that of the company. *Bowen v. Chicago, B. & K. C. R. Co. (Mo.)*, 8 S. W. Rep. 230. Compare *Gaffney v. New York, etc., R. Co.*, 15 R. I. 456; s. c. 31 Am. & Eng. R. R. Cas. 265; *Fagundes v. Central Pac. R. Co. (Cal. 1889)*, 21 Pac. Rep. 437. In the last case a track repairer caused the death of a laborer riding on a train, by interfering with a switch with which he had no concern.

(the railway company) must keep the roadbed, cars, machinery, etc., in reasonably safe repair. The implied undertaking with its conductors, engineers, brakemen, etc., and other grades of employes, is that it will use that measure of care and caution which ordinarily prudent men would exert in performing this duty. But in the nature of things how shall its duty be met, as respects keeping the road in proper repair, its locomotives, cars, and other machinery? The board of directors or managers must meet together, consult, and devise measures for the orderly management and conduct of the general business, and must intrust the various departments to suitable agents. The details as respects the maintenance of the track was shown in evidence in this case. Sections of the road are committed to a section master, with a corps of workmen. The corporation will have done all that could be reasonably be required of it, when it exercised circumspection and prudence, in appointing employes to observe the road, and when it put at their disposal suitable material for the work; and when it caused suitable supervision to be had over their local employes. For if a part of the road should become unsafe because of the neglect of such employes to make repairs, and should so continue for a length of time, sufficient to induce the presumption that the company knew of it, or ought to have known of it, then it is negligent and careless, and is liable to other employes for injuries resulting therefrom."¹ This argument is easily answered, however, by what was said by the Supreme Judicial Court of Massachusetts in *Snow v. Housatonic R. Co.*,² where it was decided that a railroad company might be held liable for an injury to one of its servants caused by a want of repair in the roadbed. The

1. *Howd v. Mississippi Cent. R.* 258.

Co., 50 Miss. 178; see also *New Orleans, etc., R. Co. v. Hughes*, 49 Miss. 2. 8 Allen (Mass.) 441.

plaintiff was injured while coming out from between the cars which he was coupling, by stepping into a hole which was permitted to remain on the side of the track, and the train catching his other foot and crushing it. It was urged in the argument for the defendant that the omission to repair the defect which occasioned the injury, was the result of the negligence of the person whose duty it was to see that the track was kept in a safe and proper condition, and that the accident was, therefore, caused by the carelessness of a fellow-servant. But this position was denied by the whole Court, Chief Justice Bigelow saying: "This argument leaves out of sight the real ground on which the liability of the defendant rests. If the argument is well-founded, then it would follow that as a corporation can only act by agents or servants, it would escape all responsibility for every species of injury caused by the defective machinery and apparatus, or badly constructed tracks, or insufficient bridges, and other similar causes. So an individual could avail himself of a similar immunity if he conducted his business exclusively by agents or servants. But the rule of law does not lead to any such absurd result. The liability of the master or employer, in such cases, is founded, as has already been said, on the implied obligation of his contract with those whom he employs in his service. This requires him to use due care in supplying and maintaining suitable instrumentalities for the performance of the work or duty which he requires of them, and renders him liable for damages occasioned by a neglect or omission to fulfill this obligation, whether it arises from his own want of care, or that of his agents to whom he intrusts the duty." In Alabama¹ and New Jersey,²

1. *Mobile, etc., R. Co. v. Smith*, 59 Ala. 245. employed agents of competent skill to regularly examine the bridges of

2. In *Harrison v. Central R. Co.*, 31 N. J. L. 293, Chief-Justice Beaseley said that if a railroad company the road, and such agents represent them to be secure, and there was no reason to doubt the accuracy of their

however, the Courts appear to have followed the Mississippi doctrine, which is substantially the rule recognized by the English common law decisions.¹

While the rule is generally applicable that when it is the duty of the employe of a railroad corporation, in the course of his work, to ride over the road of the corporation, it is its duty to provide a track suitable and sufficient for the purpose, and to maintain it in good order, it must be considered with some qualification when the road has become dilapidated and out of repairs, and is in the process of reconstruction, in which work the employe is engaged. Thus, in a New York case,² B., plaintiff's intestate, was one of a number of laborers in defendant's employ, engaged in repairing a track, the use of which had been partially abandoned, and which had fallen into decay. A construction train upon which B. was riding, ran off the track at a crossing and he was killed. Rain had fallen the night before, and the space alongside the rails for the flanges of the wheels to run in had become filled up with mud, which had frozen and so caused the accident. T. was defendant's general foreman, having charge of the work of reconstruction and repairs. He had charge of the train at the time of the accident. It was his duty to see that the crossings were properly cleaned and kept in safe condition.

report, then, although the agents acted carelessly in the discharge of their duties, the company would not be liable to a brakeman in their employ for an injury received by reason of a defective bridge. The workman employed to note the need of repairs upon bridges was held to be in common employment with the workmen whose trains ran thereon. One employed to repair such bridges would come under the same rule.

1. In *Waller v. South Eastern R. Co.*, 2 H. & C. 102, it was held that the guard of a train and the plate layers, whose duty it is to attend to

the rails over which the train passes, are engaged in one common object, the safe conduct and transit of the train, and therefore no action can be maintained against the company by the representatives of a guard of a train killed by the train running off the line, in consequence of the neglect of the ganger of the plate-layers to renew the decayed metals which fasten the chairs to the sleepers of the railway.

2. *Rochester, etc., R. Co. v. Brick*, 98 N. Y. 211; s. c. 21 Am. & Eng. R. R. Cas. 605.

He attempted to perform this duty, but failed to do it properly. In an action to recover damages for alleged negligence causing the death, it was held that the negligence causing the injury was that of a co-employee, and that defendant was not liable; also that the fact that the duty was imposed upon T. of reconstructing the entire road, did not alter his relations as co-employee here.

§ 30. *Same—Defences.*—

It is a complete answer to the claim of negligence in failing to furnish a safe place to work that the injured party had full knowledge of the situation and of the arrangements and that by continuing in the employment he assumed the risks and hazards incident to the situation, and especially such hazards as might result from the non-observance by co-employees of directions designed for the protection of all parties. A New York case¹ illustrates this principle. Defendants were engaged in the manufacture of articles from wood. The lumber was planed on the first floor of their establishment and then passed up through an opening to the floor above. This opening was in a passageway where those employed on the second floor passed back and forth in the performance of their work; when not in use it was closed by a heavy trap door. Plaintiff, an employe of the defendants, was going along the passageway in the performance of his work, when the trap-door was suddenly raised from below by a workman in the planing room; plaintiff fell through the opening and was injured. Plaintiff had been in defendant's employ for about twenty-two months, and was fully informed as to the location and use of the trap-door and the manner of its construction. Defendant had given instructions that the trap-door should not be opened from below, and the employe who opened it had been so in-

¹ *Anthony v. Leeret*, 105 N. Y. 591.

structed by the foreman. It was held that the action was not maintainable, as the injury was caused by the negligence of a co-employee; that the location of the trap-door in the passageway was not, *per se*, a wrongful act; that defendants had a right to place it there, and were not bound to change the arrangement to secure greater safety to their employes, and that plaintiff took the risk of the obvious dangers connected with his employment.

§ 31. Injuries caused partly by Defective Machinery and partly by Negligence of Fellow Servants.—

When an injury is occasioned to a servant, partly through a defect in the machinery, track, or apparatus, of the master, and partly through the negligence of a fellow servant, the master is not exonerated from liability. This is so because for a wrong or injury occasioned by the joint or co-operative agency of two or more persons all the tortfeasors are separately or jointly liable, and there is no implied contract growing out of the contract of service that the servant shall take the risk of the master's negligence, or that the latter shall be exempt, from responsibility to the servant for his own personal wrongs.¹ Thus, a brakeman in the

1. *Perry v. Ricketts*, 55 Ill. 234; *R. Co. v. Jackson*, 55 Ill. 492; *Cone v. Delaware, etc., R. Co.* 81 N. Y. 206; s. c., 2 Am. & Eng. R. R. Cas. 57; 37 Am. Rep. 491; *Cayzer v. Taylor*, 10 Gray (Mass.), 274; *Stetler v. Chicago & N. W. R. Co.*, 46 Wis. 497; *Paulmier v. Erie R. Co.*, 5 Vroom (N. J.), 151; *McMahon v. Henning*, 1 McCrary (U. S.) 516; *McDade v. Washington, etc., R. Co.*, 5 Mackey (D. C.), 144; s. c., 26 Am. & Eng. R. R. Cas. 325; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700; s. c., 12 Am. & Eng. R. R. Cas. 204; *Elmer v. Locke*, 135 Mass. 575; s. c., 15 Am. & Eng. R. R. Cas. 300; *Atchison T. & S. F. R. Co. v. Holt*, 29 Kan. 149; s. c., 11 Am. & Eng. R. R. Cas. 206; *Gulf, etc., R. Co. v. Pettis* (Tex. 1888), 7 S.W. Rep. 93; *Ellis v. New York, etc., R. Co.*, 95 N. Y. 546; s. c., 17 Am. & Eng. R. R. Cas. 641; *Anthony v. Leeret*, 105 N. Y. 591; *Lilly v. New York, etc., R. Co.*, 107 N. Y. 566; *Potts v. Port Carlisle Dock & Railway*, 2 L. T. (N. S.) 283. A master is responsible for an injury to a servant from the combined negligence of the master and a fellow-servant, notwithstanding the contributory negligence of such servant. *Faren v. Sellers*, 39 La. Ann. 1011.

employ of a railway corporation may maintain an action against the corporation for personal injuries occasioned, while in the exercise of due care, by the fall of a trestle work supporting a portion of a spur track, which was intended for use for an indefinite period of time, if the fall is caused partly by the defective construction of the trestle work, and partly by negligence of the fellow servants of the plaintiff.¹ And where a brakeman upon a freight train was in the caboose car of the train, when, seeing that a collision was imminent between it and another train following, he stepped out of the front door of the car onto the platform of the next car. The cars were furnished with buffers, but they so overlapped each other that they were useless, and, in consequence, when the trains collided, the brakeman was caught between the ends of the two cars and killed. It was held that a dismissal of the complaint was error; that it was a duty the defendants owed its employes to provide cars with buffers appropriately placed.²

Plaintiff was injured by an edger in defendant's saw mill, which by reason of its defects, was unnecessarily dangerous. *Held*, that defendant was not relieved from liability by the fact that the feeder of the edger was negligent in managing it, as his negligence simply contributed to the injury. *Sherman v. Menomonee R. L. Co.* (Wis.), 39 N. W. Rep. 365. But, in an action for the death of defendant's servant, in which defendant alleges that the injury was the result of the negligence of a co-servant, an instruction that if the co-servant and the defendant were both negligent, defendant is liable, is erroneous, as leading the jury to believe that defendant in such case would be liable, though the accident would have occurred without its negligence.—*Hall v. Cooperstown & S. V. R. Co.*, 3 N. Y. Sup. 584.

1. *Elmer v. Locke*, 135 Mass. 575.

2. *Ellis v. New York, etc., R. Co.*, 95 N. Y. 546; s. c., 17 Am. & Eng. R. R. Cas. 641.

Where machinery is held together by two clamps, which are improper appliances and make the use of the machinery dangerous, and one of these clamps breaks, and the engineer continues to run the machinery with but one clamp, which renders the use of the machinery more dangerous, and this afterwards breaks and injures a workman engaged in the same general business, the employer is not responsible; for the proximate cause of the injury was the carelessness of the engineer, who was a fellow servant of the injured man, in running his engine when it was dangerous. *Philadelphia Iron & S. Co. v. Davis*, 111 Pa. St. 597.

But, although the machinery is defective, so that otherwise a recovery might be had for an injury received, yet if *the promoting cause* of the injury is the negligence of a fellow-servant, no recovery can be had.¹ Thus, a switchman employed in the yard of a railroad company was injured, while making a coupling, by the engine used for switching being backed down upon him without warning and catching his hand between a freight car and the "goose-neck" coupling iron projecting from the rear end of the engine. The engine was not a regular switch-engine (which does not have the "goose-neck" projection, and is so constructed that the view therefrom backward is unobstructed), but was a common passenger engine. It had, however, been used by the switchman for sixteen days, was of the kind generally used in small yards, and was safe for switching purposes if used with proper care. It was held that the negligence of those in charge of the engine, and not any insufficiency or unfitness in the engine itself, was the proximate cause of the injury, and that the company was therefore not liable.² And in another case³ a locomotive which had helped a west-bound freight, was run upon the main track a little east of the

1. Wood M. & S. (2d Ed.) § 426; *Memphis, etc., R. Co. v. Thomas*, 51 Miss. 637; *Gilman v. Eastern R. Co.*, 10 Allen (Mass.), 233; *King v. Boston, etc., R. Co.*, 9 Cush. (Mass.), 112; *Hayes v. Western R. Co.*, 3 Cush. (Mass.) 270; *New Orleans, etc., R. Co. v. Hughes*, 49 Miss. 258.

2. *Fowler v. Chicago & N. W. R. Co.*, 61 Wis. 159; s. c., 17 Am. & Eng. R. R. Cas. 536.

3. *Whittaker v. Delaware, etc., Co.*, 3 N. Y. Sup. 576. In another case decided about the same time by the Supreme Court of Wisconsin, the chains connecting the lever with the draw-bar were frequently broken,

so that it was necessary for the brakeman to go beneath the platform to uncouple the cars. While the brakeman was so engaged, the conductor, not knowing his position, signalled the engineer to go ahead, and the train in starting, injured the brakeman so that death ensued. *Held*, that the negligence of the conductor in starting the train, and not the failure to have the chains repaired so that the cars could be uncoupled with the lever, was the proximate cause of the injury. *Pease v. Chicago & N. W. R. Co.*, 61 Wis. 163; s. c., 17 Am. & Eng. R. R. Cas. 527.

station, and left, while the engineer went to the station for orders, fronting to the west, with a light on its rear, but with no headlight; that having been broken the previous day. An east-bound freight collided with it, and the fireman of the east-bound freight was killed. The engine was on the track in violation of a rule of the company, that no irregular engine should be allowed on the main track without special orders, and the approaching train was passing the station at a higher rate of speed than the company's rules permitted. The General Term of the New York Supreme Court held that the company was not liable unless the accident would not have happened but for the absence of the headlight, and it was error to charge that it was liable if its negligence contributed to the injury, though deceased's co-employees were also negligent, provided deceased was guilty of no contributory negligence.

§ 32. Duty to keep Machinery and Appliances in Repair.—

We have seen that it is the duty of the master to make reasonable efforts to keep machinery and appliances in a safe and serviceable condition.¹ This is one of the duties which the master as such is bound to perform, and cannot be delegated so as to exonerate the former for liability to a servant, who is injured by the omission to perform the act or duty, or by its negligent performance, whether the non-feasance or mis-feasance is that of a superior officer, agent or servant, or of a subordinate or inferior agent or servant to whom the doing of the act or the performance of the duty has been committed. In either case in respect to such act or duty, the servant who undertakes or omits to perform it, is the representative of the master, and not a mere co-servant with the one who sustains the injury. The act or omission is the act or omission of the master, irrespective of the grade of the servant, whose negligence

1. See § 24.

caused the injury, or of the fact whether it was or was not practicable for the master to act personally, or whether he did not do all that he personally could do, by selecting competent servants, or otherwise, to secure the safety of his employes.¹

§ 33. Same.—Illustrations and Application of the Rule.—

Under the rule stated in the previous section it has been held that the machinists of a railroad company, who are employed to manufacture and repair its engines, are

1. Fuller *v.* Jewett, 80 N. Y. 46; s. c., 1 Am. & Eng. R. R. Cas. 109; Warner *v.* Erie R. Co., 39 N. Y. 468; Corcoran *v.* Holbrook, 59 N. Y. 517; s. c., 17 Am. Rep. 369; Cone *v.* Delaware, etc., R. Co., 15 Hun (N. Y.) 172; Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642; s. c., 24 Am. & Eng. R. R. Cas. 407; Hough *v.* Tex. & Pac. R. Co., 100 U. S. 213; Solomon R. Co. *v.* Jones, 30 Kan. 601; s. c., 15 Am. & Eng. R. R. Cas. 201; Atchison etc., R. Co. *v.* McKee, 37 Kan. 592; Gunter *v.* Graniteville Mfg. Co., 18 S. Car. 262; Frazier *v.* Pennsylvania Co., 38 Pa. St. 104; Porter *v.* Hannibal & St. Jo. R. Co., 71 Mo. 66; s. c., 2 Am. & Eng. R. R. Cas. 44; Covey *v.* Hannibal, etc., R. Co., 86 Mo. 635; s. c., 28 Am. & Eng. R. R. Cas. 382; Long *v.* Pacific R. Co., 65 Mo. 225; Bowen *v.* Chicago, etc., R. Co. (Mo.), 8 S. W. Rep. 230; Dutzi *v.* Geisel, 23 Mo. App. 676; McMillan *v.* Union Press Brick Works, 6 Mo. App. 434; Buzzell *v.* Laconia Mfg. Co. 48 Me. 113; Shanny *v.* Androscoggin Mills, 66 Me. 470; Cincinnati, etc., R. Co. *v.* McMullen (Ind. 1889), 20 N. E. Rep. 287; Johnson *v.* Richmond, etc., R. Co., 81 N. Car. 446; Greenleaf *v.* Illinois Cent. R. Co., 29 Iowa 14; Brann *v.* Chicago & Rock Island R. Co., 53 Iowa, 595; s. c., 36 Am. Rep. 243; Wells *v.* Coe, 9 Colo. 159; Colorado Cent. R. Co. *v.* Ogden, 3 Colo. 499; Spicer *v.* South Boston Iron Co., 138 Mass. 426; Moynihan *v.* Hills Co., 146 Mass. 586; Snow *v.* Housatonic R. Co., 8 Allen (Mass.), 441; Ford *v.* Fitchburg R. Co., 110 Mass. 241; Holden *v.* Fitchburg R. Co., 129 Mass. 268; s. c., 2 Am. & Eng. R. R. Cas. 94. (The foregoing Massachusetts cases must be considered in the light of the decision in Johnson *v.* Towboat Co., 135 Mass. 209.) Chicago & N. W. R. Co., *v.* Jackson, 55 Ill. 492; Brabbits *v.* Chicago & N. W. R. Co., 38 Wis. 298; Houston, etc., R. Co. *v.* Marcelles 59 Tex. 334; s. c., 12 Am. & Eng. R. R. Cas. 231; Missouri Pac. R. Co. *v.* McElyea (Tex.) 9 S. W. Rep. 313; Mitchell *v.* Robinson, 80 Ind. 281; s. c., 41 Am. Rep. 812. Compare Nashville, etc., R. Co. *v.* Foster 10 Lea. (Tenn.), 351; s. c., 11 Am. & Eng. R. R. Cas. 180; Thel-eman *v.* Moeller, 73 Iowa 108. The liability of a railroad company for injuries caused to one servant through the negligence of others in failing to keep the track or roadbed in repair, has been discussed already. See *ante* § 29.

not to be considered co-employees of engineers employed to run those engines.¹ Also, that if a railroad corporation suffers a derrick, not actually in use for the purposes of its business, to remain for an unreasonable length of time, on land within its control, in such a position by the side of its track as to be in danger of being thrown down by ordinary natural causes so as to interfere with the safe passage of its trains, the corporation is liable to a brakeman for injuries resulting from its own neglect in not removing the derrick, or in not guarding against the danger of allowing it to remain, even if it was put up by other servants of the corporation, and independently of the question of their negligence.² That if one appointed by a railway company to look after the condition of its cars and see that the machinery and appliances used to move and to stop them are kept in repair and in good working order, and injuries result from his negligence in its performance, the company is liable.³ That where a manufacturing company employed a competent superintendent to keep the machinery in repair and in good order, and another employe is injured by reason of the superintendent's negligence in that regard, the master is liable.⁴

In *Ford v. Fitchburg R. Co.*⁵ a fireman was injured by reason of a defect in an engine which was due to the neglect of the employes of the company charged with the duty of keeping the engine in repair, although the company had no reason to suspect negligence or incompetency on the part of such employes, and it was held that the company was liable. In *Brann v. Chicago, etc.*,

1. *Fuller v. Jewett*, 80 N. Y. 46; Eng. R. R. Cas. 407.

s. c., 1 Am. & Eng. R. R. Cas. 109.

2. *Holden v. Fitchburg R. Co.*, 18 S. Car. 262; s. c., 44 Am. 129 Mass. 268; s. c., 2 Am. & Eng. Rep. 573.

R. R. Cas. 94.

3. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642; s. c., 24 Am. &

5. 110 Mass. 240; s. c., 14 Am.

Rep. 598.

R. Co.,¹ a brakeman on a railway train was injured by reason of the failure of an inspector to perform his duty, and the company was held liable. After laying down the proposition that it was the duty of the corporation, not only to provide, in the first place, suitable and safe machinery and appliances, but also to see that they are kept in repair, the Court said: "As the corporation must act through agents and employes, the negligence of the employes, upon whom the duty of inspection is devolved, is the negligence of the corporation. The brakemen on freight trains, and such inspector cannot be regarded as co-employes in such sense as to prevent the former from recovering of the corporation because of the negligence of the latter."²

Corcoran v. Holbrook,³ decided by the New York

1. 53 Iowa 595; s. c., 36 Am. Rep. 243. *Warner v. Erie R. Co.*, 39 N. Y. 468; *Laning v. New York, etc., R. Co.*, 49 N. Y. 522; s. c., 10 Am. Rep. 417; *Flike v. Boston & A. R. Co.*, 53 N. Y. 549; s. c., 13 Am. Rep. 545.

2. "The following authorities, we think, fully sustain the foregoing views," said the Court: "*Greenleaf v. Illinois Cent. R. Co.*, 29 Iowa 14; s. c., 4 Am. Rep. 181; *Kroy v. Chicago, etc., R. Co.*, 32 Iowa 357; *Buzzell v. Laconia Manf. Co.*, 48 Me. 113; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441; *Gilman v. Eastern R. Co.*, 10 Allen (Mass.) 233; s. c., 13 Id. 433; *Ford v. Fitchburg R. Co.*, 110 Mass. 241; s. c., 14 Am. Rep. 598; *Mullan v. Phila., etc., S. S. Co.*, 78 Pa. St. 25; s. c., 21 Am. Rep. 2; *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492; s. c., 8 Am. Rep. 661; *Brabbits v. Chicago, etc., R. Co.*, 38 Wis. 298; *Harper v. Indianapolis, etc., R. Co.*, 47 Mo. 567; *Brothers v. Carter*, 52 Mo. 373; s. c., 14 Am. Rep. 424; *Porter v. Hannibal & St. Jo. R. Co.*, 71 Mo. 66; *Thompson v. Drymala* (Minn.) 1 N. W. Rep. 255; This last case, it is insisted by counsel, has been overruled by the subsequent case of *Malone v. Hathway*, 64 N. Y. 5; s. c., 21 Am. Rep. 573. This is a mistake, as it was followed in the still later case of *Booth v. Boston & A. R. Co.*, 73 N. Y. 38; s. c., 29 Am. Rep. 97."

3. 59 N. Y. 517; s. c., 17 Am. Rep. 369; and see *Kain v. Smith*, 89 N. Y. 375. Compare *Webber v. Pipper*, 109 N. Y. 496, where plaintiff was injured while using a circular saw in defendant's factory where he was employed. The accident was caused by the dullness of the saw. Defendants had furnished duplicate saws so that when one needed to be sharpened and reset, it could be replaced by the other. It was the duty of one M., also a servant of defend-

Court of Appeals, was a case in which an operative in a cotton mill was injured by the fall of an elevator, which was not kept in proper repair, and it was held that the master was liable. While the injury was attributable to the negligence of the general agent, to whom the defendant had intrusted the management of the mill, yet the principle upon which the decision rests, shows that the liability of the master was fixed, not because the injury resulted from the negligence of a general agent, but because it was the duty of the master to supply and obtain suitable machinery, and if this duty was neglected, it did not matter to whom such duty was intrusted, the master would be liable. The Court used this language: "It was the duty of the defendants toward their employes to keep the elevator in a safe condition, and to repair any injury to it which would endanger the lives or limbs of their employes, who were lawfully and properly, in the performance of their functions, in the habit of using it. That duty they delegated to their general agent. As to the acts which a master or principal is bound as such to perform towards his employes, if he delegates the performance of them to an agent, the agent occupies the place of the master, and the latter is deemed present, and held liable for the manner in which they are performed."

§ 34. Same.—Doctrine of the English Decisions.—

The decisions of the English courts are not consonant with the rule stated in the two preceding sections. They

ants, to change, sharpen and reset the saws when necessary. On the morning of the accident, plaintiff notified M. that the saw he was using was dull and asked for another. M. replied that he had no time then to sharpen a saw and directed plaintiff to go on with the work. *Held*, that plaintiff was properly nonsuited; that no negligence on defendant's part was shown; that their duty was performed when they furnished suitable saws, and the means and conveniences for keeping them sharp and properly set; that the dullness of the saw was not a defect in any legal sense, and the negligence, if any, was that of M., a fellow-servant.

generally hold that where the master has provided a reasonably safe place, machinery and materials on and with which the work is to be performed, but undertakes to keep the place and machinery in suitable repair, through agents and servants, he has fully performed his duty when he has exercised reasonable care and prudence in selecting careful and skillful servants to detect defects and make repairs, and has supplied such servants with suitable help and materials with which to make such repairs; and that the master is not liable to another servant for any negligence of the first servant in detecting and making such repairs. *Wilson v. Merry*,¹ is the leading English authority upon this point. Here the Lord Chancellor states the doctrine as follows: "I do not think the liability or non-liability of the master to his workman can depend upon the question whether the author of the accident is not, or is, in any technical sense, the fellow-workman or collaborateur of the sufferer. In the majority of cases in which accidents have occurred, the negligence has, no doubt, been the negligence of the fellow-workman, but the care of the fellow-workman appears to me to be an example of the rule and not the rule itself. The rule, as I think, must stand upon higher and broader ground * * * * The master is not and cannot be liable to his servant unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servant, for the master might be incompetent, personally, to perform the work. At all events, a servant may choose for himself between serving a master who does and a master who does not attend in person to

1. L. R. 1 H. L. Sc. App. Cas. 326.

his business. But what the master is, in my opinion, bound to his servant to do in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do; and if the persons so selected are guilty of negligence, this is not the negligence of the master. And if an accident occurs to a workman to-day in consequence of the negligence of another workman, skillful and competent, who was formerly, but is no longer in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen." In commenting upon this case, Judge Ross, of the Vermont Supreme Court, very pertinently says:¹ "This view places the liability of the master upon the duty he owes the workman arising from their relations to each other. It implies that if the master personally attempts to discharge that part of the work which the relation devolves upon him, and his negligence therein causes injury to the workman, the master is liable therefor. The question is naturally suggested, 'Why should he not also be liable for the negligence of the agent or servant whom he has appointed to discharge the same duty in his stead, although he has exercised due care to select a person competent and skillful? Is such an agent or servant, while performing the duty cast by the relation upon the master, a fellow-workman with the master's servant in such a sense, that the latter cannot and ought not to recover of the master for injuries sustained through the negligence of the former?' If so, the master who performs his part of the duty, as this defendant and all corporations must, by agents and servants, secure an immunity from liability which the master, who

1. *Davis v. Central Vermont R. R. Co.*, 173. *R. R. Cas.* 173. *Co.*, 55 Vt. 84; s. c. 11 Am. & Eng.

personally enters the service to manage and direct the performance of the work, does not enjoy. The doctrine now established by the United States Supreme Court, and by most of the courts of last resort in the several States, holds the master liable to his workman for injuries sustained from the negligent performance of duties which rest by the relation upon the master, whether the master performs such duties personally or through an agent or servant." But as regards the repair of machinery and appliances, the rule is clearly otherwise according to the English common law decisions.¹

§ 35. Same.—American Cases following the English Rule.—

There are a few American decisions which follow the rule laid down by the English Courts, and hold that where the negligence of a co-employee in the keeping in repair of a machine or appliance, which resulted in an injury to some other employee, the master is not liable to the party injured for such negligence. Perhaps the leading one is *Johnson v. Boston Tow-boat Co.*,² decided by the Supreme Court of Massachusetts in 1885, which has settled what is called the Massachusetts doctrine. This case decided that if a corporation owning a lighter furnishes appliances used by its servants in hoisting and lowering merchandise and employs a competent servant to see that they are kept in proper condition, it is not liable for an injury occasioned to one servant by the parting of a rope, in consequence of

1. *Wilson v. Merry L. R.*, 1 H. L. Sc. App. Cas. 329; *Waller v. South Eastern R. Co.*, 2 H. & C., 102; *Feltham v. England L. R.*, 2 Q. B. 33; *Wigmore v. Jay*, 5 Exch. Rep. 354; *Hall v. Johnson*, 3 H. & C. 589; *Tarrant v. Webb*, 86 Eng. C. L. 796; *Gallagher v. Piper*, 16 C. B. (N. S.) 669.

A master is not responsible for an

injury occasioned to a servant by tackle defective through the neglect of a fellow-servant if there is no negligence or want of care on the part of the master, either as respects the providing of proper machinery, or the competency of the servant. *Searle v. Lindsay*, 11 C. B. (N. S.) 429; 31 L. J., C. P. 106.

2. 135 Mass. 209.

its being used for too long a time, and after its defective condition was known to the servant whose duty it was to replace it. Justice Allen, speaking for the Court, said: "The defendant was under obligation to its servants to use reasonable diligence to maintain, in suitable condition, the appliances furnished for their use. If the defendant exercised that diligence, and provided suitable means for keeping its apparatus in proper condition, and employed competent servants to see that the means were properly used, it had fulfilled its duty. It was incidental to the use of the apparatus—a part of its contemplated use—that the rope should be occasionally renewed; and when the defendant had furnished the means for that renewal, and employed Moore to make the renewal whenever needed, it employed him as a servant and not as agent or deputy. When a master has furnished suitable structures, means and appliances for the prosecution of a business, all persons employed by him in carrying on the business by the use of the means furnished, including those who use the means directly in the prosecution of the business, those who maintain them in a condition to be used, and those who adapt them to be used by new appliances and adaptations, incidental to their use, are fellow-servants in the general employment and business. *One employed in the care, supervision and keeping in ordinary repair the means and appliances used in a business, is engaged in the common service.*"¹ Other de-

1. The italics above are the writer's. It is difficult to harmonize this case with a number of previous decisions from the same court, notably that of *Ford v. Fitchburg R. Co.*, 110 Mass. 240. Justice Allen attempts the reconciliation in the following language: "The case of *Ford v. Fitchburg Railroad*, 110 Mass. 240, is to the same effect. In that case the plaintiff, an engineer upon a locomotive engine, was injured by the explosion of the boiler of the engine. It was contended by the plaintiff that the boiler had been for a long time plainly defective, and there was evidence tending to show that the defect was known, or could have been known, by proper examination, to the master mechanic of the road, and to the superintendent of the round-house, who had charge of the engines. The defendant asked instructions, that, if the ac-

cisions from the same court, support the rule.¹

The English doctrine prevails also in Maryland, where it has been held that an employe of a railway company cannot recover for an injury sustained by reason of an alleged defective brake, unless it is shown that the company was negligent, either in providing the machinery which caused

cident could have been prevented by proper examination by them, the defendant was not liable, and that the master mechanic was a fellow-servant with the plaintiff, and the defendant was not liable for his negligence. The court declined to give these instructions and instructed the jury to the effect that, if the defendant, acting by its proper officers and servants, failed to exercise ordinary care in procuring and keeping in repair a suitable engine, it was negligent. The defendant's exceptions were overruled, and, in the opinion, Mr. Justice Colt said that the jury 'must have found, in arriving at their verdict, that the defendant corporation, by its agents, intrusted with that duty, did not exercise ordinary care and diligence, in supplying and maintaining an engine, safe to be used for motive power upon their road, in the performance of that part of the plaintiff's work in which he was engaged at the time';—that the question was 'whether the corporation in any part of its organization, by any of its agents, or for want of agents, failed to exercise due care to prevent injury to the plaintiff from defects in the instrument furnished for his use';—that the instructions asked by the defendant 'assume that the plaintiff's injury was caused by the incompetency of fellow-servants. But the action is for failing in the

exercise of ordinary care to provide a suitable engine for his use in the work required. This involves an inquiry into the existence and character of the defect, the sufficiency of the means employed for its discovery and removal, the duties required of those charged with the work of providing and keeping in safe working order the motive power of the road, and the fidelity with which these duties were discharged. This all concerns the obligations imposed upon the master, and the jury may have found for the plaintiff without regard to the competency or incompetency, the care or the negligence, of the officers named. The instructions given were all that were required.'"

1. In an action by an employe against a manufacturing corporation, for personal injuries received while endeavoring to escape from its mill, which was on fire, it appeared that the fire was caused by the heating of a bearing in one of the machines used in the mill, and that it might have been readily extinguished when first discovered; that the defendant had a cistern, with pipes leading to each story of the mill, to which were attached lines of hose, but at the time of the fire the water did not run when attempt was made to use it. *Held*, in the absence of any reason why the water did not run, that it must be

the injury, or in selecting the mechanics whose duty it was to keep it in good order.¹ The New Jersey cases also support this rule.²

§ 36. Same.—When the American Rule is Inapplicable.—

Where a servant employed by a master to operate a machine assists other operatives in repairing it, he is a fellow-servant of those who made the repairs, and if, upon

attributed to the negligence of the fellow-servants of the plaintiff in failing to keep the apparatus in order, or in failing to keep it in operation; and that the defendant was not liable. *Jones v. Granite Mills*, 126 Mass. 84.

In *Seaver v. Boston, etc., R. Co.*, 14 Gray (Mass.), 466, it was held that a carpenter employed by the day by a railroad corporation, to work on the line of their road, and carried on their cars to the place of such work without paying fare, cannot maintain an action against the corporation for injuries occasioned to him, while being so carried, by the negligence of the engineer employed by them to manage and run a locomotive engine; or by a hidden defect in an axle, the failure to discover which, if discoverable, was occasioned by the negligence of servants of the corporation, whose duty it was to examine and keep in repair the cars and engine and axles. See also *McGee v. Boston Cordage Co.*, 139 Mass. 445; *Rice v. King Philip Mills*, 144 Mass. 229.

1. *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411; s. c. 3 Am. Rep. 143. In *Yates v. McCullough Iron Co. (Md.)* 16 Atl. Rep. 280, it was held that an employe at a monthly salary, acting as chief manager in

charge of the works, without authority to buy new articles or to repair machinery, who does sometimes make slight repairs without orders, hires and discharges employes, keeps and reports their time to the officers of the company, who frequently inspect the works, and under whose directions he is in all matters, is but a fellow-servant of plaintiff and the company is not liable for his negligence in the care of the machinery.

2. *McAndrews v. Burns*, 39 N. J. L. 117. A. was employed in the blacksmith's shop of a locomotive works, and, on the direction of an officer of the company repaired a chain used in raising locomotive driving-wheels, to be worked on by plaintiff, employed for that purpose. When repaired, the chain was again furnished to and used by plaintiff, who was injured by its breaking at the link which had been repaired. *Held*, that A. and plaintiff were fellow-servants, and an instruction that A. was the agent of the employer, who was responsible for any failure on A.'s part to exercise reasonable care and skill in making such repairs, was erroneous. *Rogers L. & M. Works v. Hand*, 21 Vroom 464; and see *Malone v. Hathaway*, 64 N. Y. 5.

the completion of the repairs, and after he has resumed the operation of the machine, he is injured by a defect therein due to the negligence of those who made the repairs, to which negligence he did not contribute, he cannot recover against the master.¹ And employers are not liable to an employe engaged in the repair of a machine, where some other workman in the same shop has so carelessly done his prior part of the work of repair as to leave the machine unfit to have any additional work done upon it, and in consequence thereof an employe is injured.² Nor is a master, employing a servant to keep tools in repair or replace them with others, liable for injury to a co-servant through using a tool after it had become dull, on account of the neglect of the servant to replace it with another.³ In Iowa the rule has been held not to apply where the duties of the servant employed to inspect the machinery are not separated from the operation of the machinery.⁴ It is

1. *Reading Iron Works v. Devine*, 109 Pa. St. 246.

2. *Murphy v. Boston & A. R. Co.*, 59 How. (N. Y.) Pr. 197.

3. *Webber v. Piper*, 109 N. Y. 496. The facts in this case were these: Plaintiff was injured while using a circular saw in defendants' factory where he was employed. In an action to recover damages for the injury, it appeared that the accident was caused by the dullness of the saw. Defendants had furnished duplicate saws so that when one needed to be sharpened and reset it could be replaced by the other. It was the duty of one M., also a servant of defendants, to change, sharpen, and reset the saws when necessary. On the morning of the accident plaintiff notified M. that the saw he was using was dull, and asked for another. M. replied that he had no time then to sharpen

a saw and directed plaintiff to go on with his work. *Held*, that plaintiff was properly nonsuited; that no negligence on defendants' part was shown, that their duty was performed when they furnished suitable saws and the means and conveniences for keeping them sharp and properly set; that the dullness of the saw was not a defect in any legal sense, and the negligence, if any, was that of M., a fellow-servant.

4. *Theleman v. Moeller*, 73 Iowa, 108. In this case A. was employed to operate a circular saw in defendant's manufactory. A defect in the attachments of the saw caused it to fly from its place and injure A. The motive power for the saw was supplied by an engine in charge of B. It was also a part of B.'s employment to inspect all the machinery (including the saw), to keep it in good condition, supply de-

difficult to see, however, on what ground this doctrine can be placed. If the negligent servant is one charged with the master's duty of keeping machinery and appliances in repair, how can it make any difference whether or not he performed other duties as well, for, as is well understood, a servant may be at the same time both a fellow-servant and a representative of the master.¹

§ 37. Selection and Retention of Sufficient and Competent Servants.

The duty of the master to furnish suitable and safe material and machinery stands upon no higher or other ground than his duty to exercise due and reasonable care in the selection and retention of a sufficient number of careful, responsible, and trustworthy co-employees. He must, on engaging a man, make reasonable investigation into his character, skill, and habits of life. If he does not do this, he will be held liable for an injury occasioned either by his negligence, incapacity, or intemperance.² This being the

facts, and make repairs. *Held*, that A. and B. were fellow-servants, and the common employer was not liable to A. The Court said: "It is the rule of this Court that an employe cannot, in an action against his employer, recover for the negligence of a co-employe engaged in the prosecution of a common business. But this rule does not extend to an employe who is charged with no other duty than to inspect the machinery, in the operation of which the injury occurred. *Brann v. Railway Co.*, 53 Iowa, 595; 6 N. W. Rep. 5. But the engineer, it will be seen from the statement of the evidence just made, was not confined by his duty to the mere inspection of the machinery. He had it in charge, was required to see that it was in good condition, and to repair it

when broken or defective. These duties were not separated from the operation of the machinery. The engineer and plaintiff together operated it. The engine furnished the motive power propelling the saw, which did the work of sawing,—the very purpose for which both engine and saw were used. The saw could not be operated without the engine. The engineer was engaged in operating the saw. He was therefore a co-employe of plaintiff in the common business of both."

1. See *post*, § 42.

2. *Baulec v. New York, etc., R. Co.*, 59 N. Y. 356; *Union Pac. R. Co. v. Young*, 19 Kan. 488; *Cooper v. Mil. & P. R. Co.*, 23 Wis 668; *Mobile & M. R. Co. v. Smith*, 59 Ala. 245; *Mich. Cent. R. Co. v. Dolan*, 32 Mich. 510; *Howd v. Miss. Cent. R. Co.*, 50

duty of the master, a servant or agent who stands for him in this respect, and performs this duty is, according to the rule which we have laid down, his representative, and the master is liable for his negligence.¹ The duty of the master to furnish a sufficient number of servants, and the position occupied by a servant or agent undertaking to perform this duty for him, is illustrated by a New York case, where the defendant railway company had a person in their employ whose duty it was to dispatch the trains running over the road. On one occasion he dispatched a train, upon which the plaintiff was engaged as brakeman, with only two brakemen, when the safety of the train and its employes required three. In consequence of this insufficiency of brakemen, the plaintiff was injured, and it was held that he could recover therefor, because the negligence of the train-dispatcher was the negligence of the company.²

- Miss. 178; *Blake v. Maine Cent. R. Co.*, 70 Me., 60; *Jordan v. Wells*, 3 Woods (U. S.), 527; *Quincy Mining Co. v. Kitts* (Mich.), 9 Rep. 86; *Columbus, etc., R. Co. v. Troesch*, 68 Ill. 545; *Harper v. Indianapolis & St. L. R. Co.*, 44 Mo. 488; *Kersey v. Kansas City, etc. R. Co.*, 79 Mo. 362; s. c., 17 Am. & Eng. R. R. Cas. 638; *Moss v. Pac. R. Co.*, 49 Mo. 167; *Huffman v. Chicago, etc. R. Co.*, 78 Mo. 50; s. c., 17 Am. & Eng. R. R. Cas. 625; *Booth v. Boston, etc., R. Co.*, 73 N. Y. 38; *Mentzer v. Armour*, 18 Fed. Rep. 373; *Satterly v. Morgan*, 35 La. Ann. 1166; *East Tenn., etc., R. Co. v. Gurley*, 12 Lea (Tenn.), 46; s. c. 17 Am. & Eng. R. R. Cas. 568; *Indiana Mfg. Co. v. Millican*, 87 Ind. 87; *Crandall v. McIlrath*, 24 Minn. 127; *Delaware, etc., Canal Co. v. Carroll*, 89 Pa. St. 374; *Tyson v. North Alabama R. Co.*, 61 Ala. 554; *McDonald v. Hazeltine*, 53 Cal. 35; *Chicago, etc., R. Co. v. Doyle*, 18 Kan. 58; *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484; *Chapman v. Erie R. Co.*, 55 N. Y. 579; *Sizer v. Syracuse, etc., R. Co.*, 7 Lans. (N. Y.) 67.
1. *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 194; *Mich. Central R. Co. v. Dolan*, 32 Mich. 510; *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261; s. c., 5 Am. & Eng. R. R. Cas. 554. And see cases cited *supra*.
2. *Flike v. Boston & A. R. Co.*, 53 N. Y. 549. But if a brakeman, employed on a train of cars by the proprietors of a railroad, sustains an injury in consequence of the carelessness of another brakeman employed in the same service, and the injury would not have happened if the latter had performed his duty, it is immaterial, as respects the liability of the proprietors, whether the train was short of hands or not. *Hayes v. Western R. Co.* 3 Cush. (Mass.) 270.

The subject of the incompetency of fellow-servants will be fully discussed in another chapter.

§ 38. Establishment of Proper Rules and Regulations.—

We have seen that it is the duty of the master to make and promulgate such rules and regulations for the safety of employes, as will afford them reasonable protection against the dangers incident to the performance of their respective duties.¹ Thus, a railroad company must make and publish sufficient and necessary rules for the running of its trains and the safety and government of its employes.² This being an affirmative fact, it devolves on the company to show an observance of the duty when sued by a servant for an injury received while in its service, and negligence is shown. On such a showing the presumption will be that the negligent act was done in violation of its rules, and the company will not be liable for the act of its servants disobeying such regulations, unless the servant inflicting the injury was incompetent and the company knew it, or had reasonable and proper means of knowing it.³

No doubt then can be entertained that one clothed with power, at his own discretion to make and suspend rules and regulations, is to be regarded as the representative of the master. And where one so in legal effect the master, makes a special order with respect to the management of a particular train, which is, under the circumstances, unrea-

1. § 24.

2. *Cooper v. Iowa Central R. Co.*, 44 Iowa, 134; *Lake Shore & M. S. R. Co. v. Lavalley*, 36 Ohio St. 221; s. c. 5 Am. & Eng. R. R. Cas. 549; *Chicago, etc., R. Co. v. George*, 19 Ill. 509; *Lewis v. Seifert*, 116 Pa. St. 628. *Crew v. St. Louis, etc., R. Co.*, 20 Fed. Rep. 87; *Chicago, etc., R. Co. v. McLallen*, 84 Ill. 109; *Flike v. Boston & A. R. Co.*, 53 N. Y. 549; *Besel v. New York Cent. & H. R. R.*

Co., 70 N. Y. 171; *Haskin v. Railroad Co.*, 65 Barb. (N. Y.) 129; *Wright v. New York Cent. R. Co.*, 25 N. Y. 562; *Rose v. Boston & A. R. Co.*, 58 N. Y. 217; *Vose v. Lancashire, etc., R. Co.*, 2 H. & N. 728; *Kansas Pac. R. Co. v. Salmon*, 14 Kan. 512; *Baltimore & Ohio R. Co. v. Woodward*, 41 Md. 268.

3. *Pittsburg, etc. R. Co. v. Powers*, 74 Ill. 341.

sonable, and by the execution of such order a servant of the corporation, himself without fault, is injured, it will be no answer to an action by the injured party to say that the immediate cause of the injury was the negligence of a fellow-servant of such injured party in the execution of the unreasonable order.¹

As regards a railroad time-table, it has been held that a company or individual operating a railroad has the right to vary from the regular time-table in the running of trains; all that is required is due care and diligence in giving notice of the change and in running the train upon the changed time. It is not required that the master should see to it personally that notice of such a change comes to the knowledge of all those to be governed thereby. If there is due care and diligence in choosing competent persons to receive and transmit the necessary orders, negligence by them in the performance of it is a risk of the employment that the co-employee takes when he enters the service. The duty of the master is performed when he provides beforehand, and makes known to his servants, rules explicit and efficient, which, if observed and followed by all concerned, will bring personal notice to every one entitled to it.²

In some jurisdictions it is held that it is the duty of the master not only to establish proper rules and regulations for his service, but he must enforce those rules and regula-

1. *Pittsburg, etc., R. Co. v. Henderson*, 37 Ohio St. 549; s. c., 5 Am. & Eng. R. R. Cas. 529, citing "*Chicago, etc., R. Co. v. McLallen*, 84 Ill. 109; *Chicago, etc., R. Co. v. Moranda*, 93 Ill. 302; *Hough v. Texas, etc., R. Co.*, 100 U. S. 213; *Fuller v. Jewett*, 80 N. Y. 46; s. c., 1 Am. & Eng. R. R. Cas. 109; *Smith v. Oxford Iron Co.*, 42 N. J. L. 467; *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261; s. c. 5 Am. & Eng. R. R. Cas. 554;

Patterson v. Pittsburg, etc., R. Co., 76 Pa. St. 389; *Cumberland, etc., R. Co. v. State*, 44 Md. 283; *Ford v. Fitchburg, etc., R. Co.*, 110 Mass. 240; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287; *Lake Shore, etc., R. Co. v. Lavalley*, 36 Ohio St. 221; s. c., 15 Am. & Eng. R. R. Cas. 549."

2. *Slater v. Jewett*, 85 N. Y. 61; s. c., 29 Am. Rep. 627. See *Lewis v. Seifert*, 116 Pa. St. 628.

tions in order to exempt himself from liability for the negligence of those agents whose duty it is to enforce and comply with them.¹ Thus, one of the rules of a railroad company, furnished a section foreman for his guidance, provided that "extra trains may pass over the road at any time, without previous notice, and the foreman must be always prepared for them;" and another rule provided "he must run the hand cars with great caution, and he must not permit them to be used unless he accompany them;" and another rule required him "to compare his time-piece with the clock at the nearest telegraph office, or with the conductor on the train." It was held that these rules, as well as the law, required him to use the opportunities thus daily afforded, or any other opportunities, to ascertain what trains were expected to run over his section of the track by previous arrangement, and when so, that he may be prepared for them as well as he can be, and thus diminish the risk of a collision of extra trains with the hand-car; that if he neglects this duty, and, without the fault of one of the laborers under him, his hand-car comes into collision with an extra train, which, had he performed his duty, would not have occurred, and the laborer on the hand-car is killed or injured, the railroad company will be liable for the damages so sustained.² But these cases are opposed

1. *Madden v. Chesapeake & O. R. Co.* 28 W. Va. 610; s. c., 57 Am. Rep. 695, holding that where an engineer upon one train of a railroad company is injured by the negligence of the conductor of another train of the company running in an opposite direction, or by the fault of one of the company's telegraphic operators in transmitting a telegraphic order to such conductor, such engineer being wholly without fault or the means of preventing such negligence, or of avoiding its consequences, such engineer is not the fel-

low-servant of said conductor within the rule which exempts the company from liability for the negligent acts of fellow-servants or persons engaged in the common service; and the company will be held responsible for an injury to such engineer caused by the negligence of such conductor or operator in such manner. And see *Moore v. Wabash, etc., R. Co.*, 85 Mo. 588; s. c., 21 Am. & Eng. R. R. Cas. 509.

2. *Criswell v. Pittsburg, etc., R. Co.* 30 W. Va., 798; 33 Am. & Eng. R. R. Cas. 232.

to the weight of authority sustaining the general rule that the master's duty in this regard is fully performed when he establishes and promulgates proper rules and regulations.

§ 39. As to Inexperienced Minor Employee.—

In *Grizzle v. Frost*,¹ Chief Justice Cockburn observed: "If the owners of dangerous machinery, by their foreman, employ a young person about it, quite inexperienced in its use, either without proper directions as to its use, or with directions which are improper, and which are likely to lead to danger, of which the young person is not aware, as it is their duty to take unusual care to avert such danger, they are responsible for any injuries which may ensue from the use of such machinery." In this case a girl was employed in a dangerous service, and was injured by having her hand caught between two revolving rollers of the machinery. The rollers and the manner in which they worked were visible. The plaintiff was sixteen years of age, but it was not inferred as a matter of law, because she was of that age and knew of the existence of the revolving rollers, that she was also aware of the risk and danger to which they exposed her. This being the duty of the master, it follows that the person who performs it is not a fellow-servant of an employe who is injured through his negligence in that regard. Thus, where the foreman and general superintendent of a machine shop hired an inexperienced boy and told him to do whatever K., another employe, directed him. K. being in charge of dangerous machinery, told the boy to do a certain act in regard to it, whereby he was injured. The Supreme Court of Missouri held that K. and the boy were not fellow-servants as to that act, and the boy could recover against the

1. 3 Fost. & Finl. 622. And see that this duty is imposed on the § 24 for cases where it has been held master.

principal.¹ And where it is unusual and dangerous to clean the machinery of a mill before the stoppage of the mill, the master is responsible for the negligence of his foreman in requiring a minor in his employ to clean the machinery before the stoppage of the mill, although such work was within the scope of his employment.² But the injured person is no less a fellow-servant merely because he might have avoided the contract, under which he was working, on the ground of infancy.³ Although it has been held in Texas that where a railway company contracted with a boy fifteen years old for his services as brakeman on its railway, without the consent of the mother, his only living parent, unless the boy had sufficient discretion to comprehend and guard against the dangers of the employment when fully explained to him, as they should have been, the contract with him would not place him in the position of an employe or preclude a recovery for injuries suffered from the negligence of co-employees.⁴

Those courts, however, which adhere to the doctrine that where the employer places any servant under the direction of a co-laborer, the latter must be deemed to act for the master, seem to prefer placing cases of this kind upon that ground rather than upon the grounds we have just stated. Kansas is usually considered to be one of these States, and it has there been held that

1. *Dowling v. Allen*, 74 Mo. 13. And see *Siegel v. Schautz*, 2 T. & C. (N.Y.) 353 to same effect.

2. *Robertson v. Cornelson*, 34 Fed. Rep. 716.

3. *North Chicago Rolling Mills Co. v. Benson*, 18 Ill. App. 194. In this case an infant of sixteen years was employed as a common laborer at a rolling mill, and the next year at his own solicitation, was promoted to be a switchman's helper, and while coupling cars in that ca-

capacity was killed. *Held*, that the contract to work as switchman's laborer was not void, but only voidable; that while engaged in coupling the cars he was the fellow-servant of defendant's other servants who had the management of the train, notwithstanding his infancy. And see *Coombs v. New Bedford Co.*, 102 Mass. 572, and *ante* § 19.

4. *Hamilton v. Galveston, etc., R. Co.*, 54 Tex. 556; s. c., 4 Am. & Eng. R. R. Cas. 528.

where an ignorant boy, seventeen years old, an apprentice in a machine shop, was directed by the foreman in charge to obey the call and direction of W., another employe, engaged in drilling an engine frame, which work required a skilled mechanic to safely handle; and W., being also an unskilled apprentice, negligently removed the clamp that was provided to hold the frame from falling, and in that position attempted to move the engine frame, and directed the boy to move the trestle farther under the frame, when it fell and killed the boy, W. and the boy were not fellow-servants, and that the negligence of W. was the negligence of the employer. The Court observed: "Where the employer places an employe under the control and direction of another, and the latter, in the exercise of the authority so conferred, orders the former into a place of unusual danger, and thus exposes him to extraordinary peril, of the existence and extent of which he is not advised, the master is liable; and we think this case comes within the exceptions to the general rule."¹

But if the minor has had experience in the work in which he is injured it does not affect the general rule. Thus, if a boy, between fourteen and fifteen years of age, while cleaning machinery in a mill, is injured by the negligence of a fellow-servant in starting the machinery, he cannot maintain an action against his employer if it appears that he has done such work for two years and a half.² And gener-

1. *Missouri Pac. R. Co. v. Peregoy*, 36 Kan. 424. In *Fisk v. Central Pac. R. Co.*, 72 Cal. 38, however, plaintiff, a boy twelve years of age, was employed by the foreman of defendant's boiler shops to work in the toolroom, and was directed to obey the boss of that room. Subsequently he was sent by such boss to see if there was any work for him to do in the shop, and while there he was set to work by one of the employes on dangerous machinery, and was

injured. *Held*, that the instruction to plaintiff to obey the boss would be construed to apply to employment in the toolroom alone, and that, the boss not being authorized to send plaintiff to the shop in quest of employment, defendant was not responsible for the injuries received through the carelessness of its employes.

2. *Curran v. Merchants Mfg. Co.*, 130 Mass. 374; s. c., 39 Am. Rep. 457-

ally, aside from the matters of which we have been speaking, the fact that the servant injured is a minor does not affect his legal rights in this respect.¹

§ 40. *As to Inexperienced Adults.*—

The same rule applies to inexperienced adult servants. As where certain store keepers order the porter in their store to run an elevator, and, as he had never run one before, furnished him an instructor to teach him how to do so, they are answerable for any injury to him in the use of the elevator arising from the incompetency or negligence of the instructor; for in such a case the instructor does not stand to the injured party in the relation of a co-servant, but as a representative of the master.²

In another case,³ a railroad company, whose duty it was to keep its track clear from snow, and who was accustomed to do so with men hired temporarily for that purpose, employed the plaintiff with his team to scrape the tracks. The day was very stormy, and the plaintiff was the only man out with a team. He was ignorant of the time for the passage of trains and wholly unused to the work, and he objected to the employment upon these grounds; but the foreman agreed to advise him of the approach of the trains, and thereupon the plaintiff consented to do the work. While employed in the work he was struck by a train, of whose coming the foreman failed to advise him. The General Term of the New York Supreme Court held, that as the stipulation to protect the servant from danger was not an unreasonable one, as he was the only one the foreman could employ to do the work, he was

1. *King v. Boston & N. W. Co.*, 9 Wall. (U. S.) 553; *ante* § 19. *Cush. (Mass.)* 112; *Curran v. Merchants' Mfg. Co.*, 130 Mass. 374; (N. Y.) 208.
2. *Brennan v. Gordon*, 13 Daly
3. *Bradley v. New York Cent. R. Co.*, 3 N. Y. Sup. Ct. 288.
Sullivan v. India Mfg. Co., 113 Mass. 369; *Union Pac. R. Co. v. Fort*, 17

authorized to make the stipulation ; and that the plaintiff had a right to rely upon his superior knowledge and judgment of the coming trains, and therefore was not required to be on the lookout for trains, and that the foreman, having failed to notify him of their approach, the defendants were responsible for the injurious consequences.

§ 41. Delegating Charge of Entire Business to one Person.—

Many authorities of great weight have held that if the master places the entire charge of the business in the hands of an agent, exercising no authority therein, he may be liable for the negligence of such agent to a subordinate employe, and that this rule prevails, whether the master be an individual or a corporation.¹ Thus it was said in the case of *Mullan v. Philadelphia & Southern Steamship Co.*,² that "where a master places the entire charge of his business, or a branch of it, in the hands of an agent, exercising no discretion and no oversight of his own, the neglect of the agent of ordinary care in supplying and maintaining suitable instrumentalities for the work required is a breach of duty for which the master should be liable. The neglect of the agent with such power becomes the neglect of the master." And in a New York case,³ after a full review of the cases, it was said : "Where a corporation through its directors commits the charge of its business to the hands of an agent, exercising no superintendence over him, the corporation will be liable to a subordinate employe for the

1. *Smith v. Oxford Iron Co.*, 13 Cal. 20; *Gormley v. Vulcan Iron Works*, 61 Mo. 492; *Dobbin v. Richmond & D. R. Co.*, 81 N. Car. 446; *Mullan v. Philadelphia & S. M. S. S. Co.*, 78 Pa. St. 25; s. c. 21 Am. Rep. 2; *Ryan v. Bagaley*, 50 Mich. 179; s. c., 45 Am. Rep. 35; *Brickner v. New York Cent. R. Co.*, 2 Lans. (N. Y.) 506; s. c., 49 N. Y. 672; *Malone v. Hathaway*, 64 N. Y. 5; *Beeson v. Green Mountain G. M. Co.*, 57

Cal. 20; *Gormley v. Vulcan Iron Works*, 61 Mo. 492; *Dobbin v. Richmond & D. R. Co.*, 81 N. Car. 446; s. c., 31 Am. Rep. 512; *Slater v. Chapman (Mich.)*, 35 N. W. Rep. 106.

2. 78 Pa. St. 25.

3. *Brickner v. New York Cent. R. Co.*, 2 Lans. (N. Y.) 506; affirmed, 49 N. Y. 672.

negligence of such agent in employing co-servants, or in providing suitable appliances for the work." These propositions are correct enough, but it will readily be seen that they do not in any way affect or modify the correct rule. If an employer gives over to one agent the entire charge of his business, such agent must perform the duties which the law imposes upon the master, and the result is the same as if the master had delegated the performance of one duty to one agent and another to another agent; he is responsible for their neglect in both cases.

There is a *dictum* in a New York case which makes a distinction between corporations and natural persons in this regard. In *Malone v. Hathaway*, Allen, J., maintained that when the servant by whose acts of negligence or want of skill other servants of a common employer have received injury is the *alter ego* of the master to whom he has left everything, then the middleman's negligence is the negligence of the employer, for which the latter is liable. But when the master is an individual acting *sui juris*, and there is no evidence of a surrender of power and control to any subordinate, and he is present superintending the establishment in person, no such responsibility attaches in respect of the acts of a competent foreman selected by and in the employment of the master.¹ Mr. Wharton, in his work on negligence,² declares this doctrine to be in harmony with the American cases. The English courts have, however, not assented to it, and at least one American text writer has raised his voice against a rule so obviously unjust.³

§ 42. Vice Principal doing Co-servant's Work.—

From the foregoing rules there results the conclusion,

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| 1. <i>Malone v. Hathaway</i> , 64 N. Y. | 2. § 229. |
| 5; s. c., 21 Am. Rep. 573; <i>Cumberland, etc., R. Co. v. Hogan</i> , 45 Md. | 3. Beach, <i>Contrib. Neg.</i> § 113. |
| 229; <i>Patterson v. Pittsburg, etc., R. Co.</i> , 76 Pa. St. 389. | And see <i>Evansville, etc., R. Co. v. Baum</i> , 26 Ind. 74. |

singular but logical, that an employe may, in certain instances occupy a dual position, that of co-servant as to all matters within the scope of the employment and the discharge of such duties as are not personal to, or absolute upon, the master, and as agent of the master as to all matters where he is charged with the discharge of duties which the master himself should have discharged, or which rest upon the master as absolute duties. This principle has been recognized in a number of cases and applied under many varieties of facts.¹ In a case decided by the New York Court of Appeals* the plaintiff was an employe in defendant's iron works, which were under the management and control of defendant's agent B., the defendant living elsewhere and only occasionally visiting the works. B. carelessly let steam on an engine near which plaintiff was working, whereby the plaintiff was injured. In an action for that injury the Court charged that B. represented the defendant only in respect to the duties confided to him as managing agent, but refused to charge that as to other duties he was to be regarded as a fellow-servant, with the plaintiff, and left it as a question of fact. The Court held that such refusal was error.

1. *Quinn v. New Jersey Lighterage Co.*, 23 Fed. Rep. 363; *Brick v. Rochester, etc., R. Co.*, 98 N. Y. 211; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Engine Works v. Randall*, 100 Ind. 293; *Moore v. Wabash, etc., R. Co.*, 85 Mo. 588; *Hussey v. Cogger* (N. Y. 1889), 20 N. East. Rep. 556; *Crispin v. Babbitt*, 81 N. Y. 516; *Loughlin v. State*, 105 N. Y. 159; *Berea Stone Co. v. Craft*, 31 Ohio St. 287; *St. Louis, etc., R. Co. v. Welch* (Tex.), 10 S. W. Rep. 529; *Couch v. Charlotte, etc., R. Co.*, 22 S. Car. 557; s. c., 28 Am. & Eng. R. R. Cas. 331; *Green, J.*, in *Criswell v. Pittsburg, etc., R. Co.* (W. Va.), 33 Am. & Eng. R. R. Cas. 242, said: "I think the better considered views of recent American cases is, that if a master delegates to a superintendent the performance of certain duties, to the extent of the discharge of those duties, he stands in the place of the master; but, as to all other matters, he is a mere co-servant." Compare *Hardy v. Minneapolis, etc., R. Co.*, 36 Fed. Rep. 657.

2. *Crispin v. Babbitt*, 81 N. Y. 516; s. c., 37 Am. Rep. 521, *Earl, J.*, dissenting.

CHAPTER IV.

THE SUPERIOR SERVANT LIMITATION.

- § 43. The Superior Servant Limitation.
- 44. Origin of the Limitation—Ohio Cases.
- 45. Rule in Kentucky.
- 46. The Rule in Other States.
- 47. Alabama.
- 48. Connecticut.
- 49. Georgia.
- 50. Illinois.
- 51. Indiana.
- 52. Iowa.
- 53. Kansas.
- 54. Maryland.
- 55. Michigan.
- 56. Missouri.
- 57. Nebraska.
- 58. New York.
- 59. North Carolina.
- 60. Pennsylvania.
- 61. Rhode Island.
- 62. South Carolina.
- 63. Tennessee.
- 64. Texas.
- 65. Vermont.
- 66. Virginia.
- 67. West Virginia.
- 68. Wisconsin.
- 69. United States Supreme Court—Chicago, Milwaukee, &
St. P. R. Co. *v.* Ross.
- 70. General Remarks—Application of the Limitation.
- 71. Stipulation by Master for Exemption from Liability for
Torts of Superior Servant.

§ 43. The Superior Servant Limitation.—

In a number of jurisdictions in this country, some of them having courts of great learning, there is a distinction in their relation to their common employer, between servants exercising no supervision over others engaged with them in the same employment, and those who are clothed with the control and management of a distinct department in which their duty is that of direction and superintendence. Such employes, while acting in that position, are held to be representatives of the master and not fellow-servants within the meaning of the rule. This limitation is based upon the theory of the presumed presence of the principal in reference to the acts of servants or agents. But, as we shall see hereafter, it ignores entirely the true criterion of fellow-service. It deals altogether with station or position which the two employes occupy, and overlooks the character of the act out of the negligent performance or the nonperformance of which the injury arose.

The doctrine has been stated as follows: "Where the negligent servant is, in his grade of employment, superior to the injured servant, or where one servant is placed by the employer in a position of subordination, and subject to the orders and control of another, in such a way and to such an extent that the servant so placed in control may reasonably be regarded as representing the master, as his *alter ego* or vice principal, when such inferior servant, without fault, and while in the discharge of his duty, is injured by the negligence of the superior servant, the master is liable in damages for the injury."¹ This idea that the master is responsible to inferior servants for the acts of superiors has produced endless confusions in the decisions. In general it is favored by text writers and adopted by the southern and western courts, and by the United States Supreme Court² On the other hand the entire doctrine

1. Beach, Contrib. Neg. § 110.

2. Chicago, M. & St. P. R. Co. v.

of the liability of the master for a superior's tort to an inferior, is unequivocally repudiated by courts whose number and authority (saving the United States Supreme Court) outweighs that of those favoring the doctrine.¹

Ross, 112 U. S. 377; s. c., 17 Am. & Eng. R. R. Cas. 501; Louisville & N. R. Co. v. Collins, 2 Duv. (Ky.) 113; s. c. 87 Am. Dec. 486; East Tenn., etc., R. Co. v. Collins, 85 Tenn. (1 Pickel) 227; Nashville, etc., R. Co. v. Jones, 9 Heisk. (Tenn.) 27; Washburn v. Nashville, etc., R. Co. 3 Head (Tenn.) 638; Nashville, etc., R. Co. v. Wheless, 10 Lea (Tenn.) 741; s. c., 15 Am. & Eng. R. R. Cas. 315; Louisville, etc., R. Co. v. Bowles, 9 Heisk. (Tenn.) 866; s. c., 1 Alb. L. J. 119; Cowles v. Richmond, etc., R. Co., 84 N. Car. 309; s. c., 2 Am. & Eng. R. R. Cas. 90; Dobbin v. Richmond, etc. R. Co., 81 N. Car. 446; Criswell v. Pittsburg, etc., R. Co. 30 W. Va., 798; 33 Am. & Eng. R. R. Cas. 232; Lake Shore, etc., R. Co. v. La Valley, 36 Ohio St. 221; s. c., 5 Am. & Eng. R. R. Cas. 549; Berea Stone Co. v. Kraft, 31 Ohio St. 287; Kansas, etc., R. Co. v. Little, 19 Kan. 267; Chicago, etc., R. Co. v. Lundstrom, 16 Neb. 254; s. c., 21 Am. & Eng. R. R. Cas. 528; Burlington, etc., R. Co. v. Crockett, 19 Neb. 138; s. c., 24 Am. & Eng. R. R. Cas. 390; Smith v. Sioux City, etc., R. Co., 15 Neb. 583; s. c. 17 Am. & Eng. R. R. Cas. 561; Moon v. Richmond, etc., R. Co., 78 Va. 745; s. c., 17 Am. & Eng. R. R. Cas. 531; Atlanta Cotton Factory v. Speer, 69 Ga. 137; Baldwin v. St. Louis, etc., R. Co., 63 Iowa, 210; Northern Pac. R. Co. v. O'Brien (Wash. Ter. 1889), 21 Pac. Rep. 32; Chicago & A. R. Co. v. May, 108, Ill. 288; s. c., 15 Am. & Eng. R. R. Cas. 320; Lalor v. Chicago, etc. R. Co., 52 Ill. 401; Wabash, etc., R. Co. v. Hawk, 121 Ill. 259; Mason v. Edison Mach. Works, 28 Fed. Rep. 228; Graville v. Minneapolis & St. L. R. Co., 3 McCrary (U. S.) 352; Thompson on Neg. 1028 § 34; Shear & R. on Neg. § 102; Wharton on Neg. § 229; Beach, Contrib. Neg. § 110.

1. Rochester, etc. R. Co. v. Brick, 98 N. Y. 211; s. c. 21 Am. & Eng. R. R. Cas. 605; Malone v. Hathaway, 64 N. Y. 5; Sherman v. Rochester, etc., R. Co., 17 N. Y. 153; Hoffnagle v. New York, etc., R. Co., 55 N. Y. 608; Crispin v. Babbitt, 81 N. Y. 516; Blake v. Maine Cent. R. Co., 70 Me. 60; Lawler v. Androscoggin R. Co., 62 Me. 463; Conley v. Portland, 78 Me. 217; Keystone Bridge Co. v. Newberry, 96 Pa. St. 246; s. c. 42 Am. Rep. 543; Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432; Reese v. Biddle, 112 Pa. St. 72; New York, etc., R. Co. v. Bell (Pa.), 28 Am. & Eng. R. R. Cas. 338; Summersell v. Fish, 117 Mass. 312; Holden v. Fitchburg R. Co., 129 Mass. 268; s. c. 2 Am. & Eng. R. R. Cas. 94; Zeigler v. Day, 123 Mass. 152; O'Connor v. Roberts, 120 Mass. 227; Peterson v. White Breast Coal, etc., Co., 50 Iowa, 673; O'Connell v. Baltimore, etc., R. Co., 20 Md. 212; Brazil, etc., Co. v. Cain, 98 Ind. 282; Columbus, etc., R. Co. v. Arnold, 31 Ind. 174; Quincy Mining Co. v. Kitts, 42 Mich. 34; Fraker v. St. Paul, etc., R. Co., 32 Minn. 54; s. c. 15 Am. & Eng. R. R. Cas. 256; Foster v. Minnesota Cent. R. Co., 14 Minn. 360; Brown

§ 44. *Origin of the Limitation.—Ohio Cases.—*

This limitation was directly forecast by Judge Shaw in his opinion in the *Farwell* case,¹ when he said: "To say that the master shall be responsible because the damage is caused by his agents, is assuming the very point which remains to be proved. They are his agents to some extent, and for some purposes, but whether he is responsible in a particular case, for their negligence, is not decided by the single fact that they are, for some purposes, his agents." It was also directly pressed upon the Court in the early South Carolina case² where an engineer and a fireman were held to be fellow-servants. Judge Evans disposed of the question in the following language: "The engineer no more represents the company than the plaintiff. Each in his several department represents his principal. The regular movement of the train of cars to its destination is the result of the ordinary performance, by each, of his several duties. If the fireman neglects his part, the engine stands still for want of steam; if the engineer neglects his, everything runs to riot and disaster. It seems to me, it is, on the part of the several agents, a joint undertaking, where each one stipulates for the performance of his several part. They are not liable to the company for the conduct of each other, nor is the company liable to one for the misconduct of another." It is clearly seen from these extracts that the doctrine was not countenanced by either of the two cases to which we are indebted for the introduc-

v. Winona & St. P. R. Co., 27 Minn. 162; s. c. 38 Am. Rep. 285; *Murphy v. Smith*, 19 C. B. N. S. 361; *Collier v. Steinhart*, 51 Cal. 116; *McLean v. Blue Point Min. Gravel Co.*, 51 Cal. 255; *Gulf. etc., R. Co. v. Blohn* (Tex. 1889), 11 S. W. Rep. 867; *Howells v. Landore Seimens Steel Co.*, L. R. 10 Q. B. 62; *Allen v. New Gas Co.*, 1 Exch. Div. 254; *Feltham v. Eng-*

land, L. R. 2 Q. B. 33, reversing s. c. 4 Fost. & Fin. 460; *Wilson v. Merry*, L. R. 1 H. L. Sc. App. 326. In *Zeigler v. Day*, 123 Mass. 152, a superintendent, receiving a portion of the profits for his services, was held to be a fellow-servant with a laborer.

1. 4 Metc (Mass.) 49.

2. *Murray v. South Carolina R. Co.*, 1 McMullan (S. Car.) 385.

tion for the fellow-servant rule in this country. We must look to the Supreme Court of Ohio to find the first recognition of the limitation. In 1851 the case of *Little Miami Railroad Co. v. Stevens*¹ came before that court, and it was adjudged, quoting from the syllabus, that "where an employer placed one person in his employ under the direction of another, also in his employ, such employer is liable for injury to the person of him placed in the subordinate situation, by the negligence of his superior." Applying this principle, the court held that a railroad company is liable where it places an engineer under the orders of a conductor and he is injured through the negligence of the latter. "We could easily suppose a case," said Caldwell, J., "where two persons employed by the same individual, and standing on a perfect equality—where the business was managed as much by one as the other—where they would stand on the same footing as men in the community generally do—in which the employer would not be liable for an injury done to one by the negligence of the other. But we regard this case as standing on an entirely different footing." The Court specifically refused to be bound by the reasoning in the *Farwell* case and the *Murray* case, saying: "The case in 4 Metcalf denies the right of recovering, principally on two grounds, namely, that the person employed contracts with reference to the perils of the employment; and that he receives a compensation, in the way of wages, for such perils, and therefore he cannot recover; and that it would be contrary to public policy to permit a recovery, as the tendency would be to produce carelessness on the part of persons thus employed. The decision in 1 McMullan appears to be based principally on the first of these two propositions. We have noticed both of these propositions in our previous remarks. In both cases much stress is laid upon the fact that no precedent of

1. 20 Ohio, 416.

a recovery under such circumstances is to be found. It is to be noticed, that in both of these cases the facts differ in some particulars from the present; we must admit, however, that the reasoning in those cases would cover the one now before us. So far as those cases decide that a recovery cannot be had in a case like the one now before the Court, we think they are contrary to the general principles of law and justice, and we cannot follow them as precedents." The doctrine thus became firmly rooted. The same court took the same view again in 1854 in the case of *Cleveland, etc., R. Co. v. Keary*.¹ The decision in the Stevens case having been made by a divided court, and its correctness having been denied, the Court again examined the grounds on which it was placed, and the rule there laid down met with the unanimous approval of the Court. Judge Rainey carefully specified that the doctrine applied to corporations, which could not act in person, and went also to the full length of denying the doctrine of *Priestly v. Fowler* and *Farwell v. Railroad Co.* He brought forward in support of this view the Scots case of *Dixon v. Rankin*,² decided in 1852, wherein the

1. 3 Ohio St. 201. In this case it was held that where a railroad company place a brakeman in their employ under the control of the conductor, the latter having exclusive command of the train, and the brakeman, without fault on his part, is injured by the carelessness of the conductor, the company is liable.

2. 1 Am. Ry. Cas. 569; 14 Sec. Ser. 420. In this case the Lord Justice clerk, after referring to the English decisions, proceeds to say: "The master's primary obligation in every contract of service, in which his workmen are employed in a hazardous and dangerous occupation, for his interest and profit, is to pro-

vide for and attend to the safety of the men. That is his first and leading obligation, paramount even to that of paying for their labor. This obligation includes the duty of furnishing good and sufficient machinery and apparatus, and of keeping the same in good condition, and the more rude and cheap the machinery, and the more liable on that account to cause injury, the greater his obligation to make up for its defects by the attention necessary to prevent such injury. In his obligation is included, as he cannot do everything himself, the duty to have all acts by others whom he employs done properly and carefully in order to avoid

doctrines of the English cases were repudiated, and an exactly contrary decision made. In subsequent cases, however, the Court recognized and applied the ordinary rule and expressly stated that the earlier cases turned upon the subordination of the injured servant. The exception engrafted into the doctrine by the Ohio court by these early cases, and now recognized, is this: that where one servant

risk. This obligation is not less than the obligation to provide for the safety of the lives of his servants by fit machinery. The other servants are employed by him to do acts which, of course, he cannot do himself, but they are acting for him, and instead of himself, as in his hands. For their careful and cautious attention to duty, and for their want of vigilance, and for their neglect of precaution by which danger to life may be caused, he is just as much responsible as he would be for such misconduct on his own part if he were actually working or present. *And this particularly holds as to the person he intrusts with the direction and control over any of his workmen, and who represents him in such a matter.*" And he adds: "There have been many cases in Scotland, at all periods and during the last fifty years, a *very* large number which proceeded on this as a fixed principle of the law as to the contract of service."

Lord Cockburn, after stating that "the plea that the master is not liable rests solely on the authority of two or three very recent decisions of English courts," says: "If this be the law of England I speak of it with all due respect. But it most certainly is not the law of Scotland. I defy any industry to produce a single decision, or dictum, or institu-

tional indication, or any trace of any authority to this effect, or of this tendency, from the whole range of our law. If such an idea exists in our system, it has, as yet, lurked undetected. It has never been condemned, because it has never been stated." After alluding to the fact that the rule had been pressed upon the Court, not only on account of the weight of English authority, but for its own inherent justice, he proceeds: "This last recommendation tails with me, because I think the justice of the thing is exactly in the opposite direction, I have rarely come upon any principle that seems less reconcilable to legal reason. I can conceive some reasonings for exempting the employer from liability altogether, but not one for exempting him only when those who act for him injure one of themselves. It rather seems to me that these are the very persons who have the strongest claim upon him for reparation, because they incur danger on his account, and certainly are not understood, by our law, to come under any engagement to take these risks on themselves." This decision, however, as we have seen, was overruled by the House of Lords in so far as it was inconsistent with *Priestly v. Fowler* and *Bartonshill Coal Co. v. Reid*, 3 Macqueen, 266.

is placed in a position of subordination to and subject to the orders and control of another servant of a common master, and the subordinate servant, without fault of his own, and while in the performance of his duty, is injured through the negligence of the superior servant while acting in the common service, an action lies in favor of the inferior servant so injured against the master.¹

§ 45. *Same.*—Rule in Kentucky.—

This doctrine (the superior servant limitation) was early taken up in Kentucky, but the courts of that State have never gone to the extent of the early Ohio cases. The leading authority is *Louisville & N. R. Co. v. Collins*,² decided by Chief Justice Robertson, in 1865, when the whole question was new and unsettled in that court. A common laborer, assisting an engineer in righting a locomotive, was injured by the negligence of the latter in starting the locomotive while the former was working beneath it. He sued the company and obtained a verdict for five thousand dollars in the trial court. "The appeal presented," said Judge Robertson, "the question involving the legal liability of railroad companies for damages resulting to an inferior from the negligence of a superior

1. *Mad River, etc., R. Co. v. Barber*, 5 Ohio St. 541; *Whaalen v. Mad River, etc., R. Co.*, 8 Ohio St. 249; *Pittsburg, etc., R. Co. v. Devinney*, 17 Ohio St. 197; *Manville v. Cleveland & T. R. Co.*, 11 Ohio St. 417; *Meara v. Holbrook*, 20 Ohio St. 137; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287; *Kumler v. Junction R. Co.*, 33 Ohio St. 150; *Pittsburg, etc., R. Co. v. Lewis*, 33 Ohio St. 196; *Pittsburg, etc., R. Co. v. Ranney*, 37 Ohio St. 665; s. c., 5 Am. & Eng. R. R. Cas. 533; *Lake Shore, etc., R. Co. v. Lavalley*, 36 Ohio St. 221; s. c., 5 Am. & Eng. R. R. Cas. 549; *Pittsburg,*

etc., R. Co. v. Henderson, 37 Ohio St. 549; s. c., 5 Am. & Eng. R. R. Cas. 529; *Dick v. Railroad Co.*, 38 Ohio St. 389; s. c., 8 Am. & Eng. R. R. Cas. 101; *Little Miami, etc., R. Co. v. Fitzpatrick*, 42 Ohio St. 318; s. c., 17 Am. & Eng. R. R. Cas. 578. In the case last cited, however, it was held that inspectors of cars and brakemen are fellow-servants, and a railroad company is not liable for an injury to the latter, occasioned by the negligence of the car inspector.

2. 2 Duv. (Ky.) 114; s. c., 87 Am. Dec. 486.

employee, while engaged in different spheres of employment in the common service of any such corporation." After disposing of the question of contributory negligence, the Court proceeded to the discussion of the main issue involved, and said: "In all these operations (the running of trains) the invisible corporation, though never actually, is yet always constructively, present through its acting agents, who represent it, and whose acts within their representative spheres, are its acts. Had the appellee been a stranger, the appellant would therefore have been certainly suable and responsible in this action, and we cannot admit that the appellee's relation as an employee in its service should exempt the corporation from that general liability, as it might perhaps do by the application of a recent rule adjudged in England, with some exceptions, and echoed, with still more exceptions, by a few American courts. But this anomalous rule, even as sometimes qualified, is, in our opinion, inconsistent with principle, analogy, and public policy, and is unsupported by any good or consistent reason. In the use and control of the engine the engineer is the chief and governing agent of the corporation, and all his associates in that employment are employees in 'a common service.' Neither of these subordinates under his control is, as between themselves, an agent of the railway company, and therefore it is not responsible for any damage done by one of them to another while in its service, and so far the British rule has foundation in both reason and analogy, but beyond this it is baseless of any other support than a falsely assumed public policy or implied contract. In the employment and control of his subordinates the engineer acts as the representative agent of the common superior—the corporation. They have no authority to control or resist him in his allotted sphere of service, and why, then, should the law imply a contract to trust him alone, and never look to the corporation, as his

employer and constituent, for indemnity for damage resulting from his willful wrongs or grossly negligent omissions? When they engaged to serve under him, perhaps they knew nothing of his trustworthiness or his credit; but they knew that they would serve a corporation, and probably faith in its responsibility and protection induced them to venture into its service,—and this faith may be presumed to include assurance of safety as well as of pay. Perhaps if they had understood that the corporation would not be responsible for the conduct of its engineer, they would never have risked such service under him. The contract implied by law would, therefore, rather seem to be that the subordinates should look to the corporation, and not its agent alone, for indemnity for loss arising to them from his unskillfulness or culpable negligence.

“Nor can we perceive how public policy could be subserved by the irresponsibility of the corporation in such a case. Such exemption, if known, might possibly stimulate the subordinates to a more vigilant observance of the engineer’s conduct; but why should they be left to depend on that which could be of little, if any, avail to prevent the unskillfulness or negligence of a superior above their dictation or control? * * * * * In their employment, having nothing to do with the cars or the running of them, they, like the corporation’s mere wood-choppers, are comparative strangers to the engineer and his running operations, and seem to be entitled to all the security of strangers. They may be presumed to know no more than strangers about the skill or care of the engineer, nor have they any more control over him or connection with his running arrangements or operations. They are, therefore, not, in the essential sense of contradistinctive classification, ‘the same service’ with the engineer and his running co-operators, who act in a different sphere and constitute a distinct class; consequently, neither of the assumed reasons for

the British rule as to employes 'in the same service' can be, in any way, consistently applied as between the engineer and such common laborers as the appellee; and the apparent extension of the rule to them may be deemed inadvertent, or not carefully and logically considered with rational discrimination and precision. We therefore can neither feel the rationale, nor acknowledge the authority of the crude and self-contradictory decisions, or loose and incongruous *dicta* referred to on that subject; but to harmonize the law, we must recognize a more congenial principle of normal vitality, and adjudge, as we now do; that the appellee, in his humble and isolated employment, should be treated as a stranger to the engine as a motive power, and if without fault himself, might, like other strangers, recover from the railway corporation for a loss arising from the ordinary negligence of its engineer; but as the jury might possibly have found that he himself had been negligent, the Circuit Court was right in requiring proof of gross negligence by the engineer, which, in that contingency, would have been necessary to the liability of the appellant. * * * * This is the only doctrine we cannot recognize as consistent with the enlightened and homogeneous jurisprudence of this clearer day of its ripening maturity; and looking through the mist of the adjudged cases and elementary *dicta*, we can see no other fundamental principle which can mould them into a consistent or abiding form. That principle is the only safe clue to lead the bewildered explorer to the light which shows the sure way of right and proves the true doctrine of American law."

Not one of the authorities accumulated in the twenty-eight years since *Priestly v. Fowler* was decided are cited by the Court. In view of weight and number of these decisions it is certainly not an assurance of the erudition of the Court for it to casually mention "a recent rule adjudged

in England, with some exceptions, and echoed, with still more exceptions, by a few American courts." It is enough to say, however, that the doctrine of this case has been the rule in Kentucky since it was decided.¹

§ 46. *The Rule in Other States.*—

It is not inaccurate to say that the limitation upon the general rule first conceived by the Supreme Court of Ohio, and afterwards taken up by the Kentucky Court of Appeals, has received a recognition at one time or another, and more or less limited, by a decided minority of the jurisdictions in this country. The growth of the rule has been much obscured by the reports frequently omitting to mention the cases cited by counsel, and sometimes the judges increase this difficulty, by taking up the ideas pressed upon them, but not alluding to the authorities relied on. Owing to this reason, perhaps, as well as to others, there is seemingly much inconsistency in the decisions of many of the same states. We shall then, as the best way of discovering exactly how far the superior servant limitation has been recognized, examine the decisions of those states which have been accredited with approving of it,

1. *Louisville & N. R. Co. v. Robinson*, 4 Bush (Ky.) 508; *Louisville, etc., R. Co. v. Cavens*, 9 Bush (Ky.) 559; *Kentucky Cent. R. Co. v. Ackery* (Ky.), 8 S. W. Rep. 691. In *Louisville, etc., R. Co. v. Moore* (Ky.), 24 Am. & Eng. R. R. Cas. 443, it was held that a conductor was not a fellow-servant of a brakeman. The Court observed: "Here the conductor had the entire control of the train; and subject to him to a certain extent, the engineer had control of the brakemen. These two superior officers were the personal representatives of the corporation as to the appellee, and for the gross

neglect of either the corporation is responsible. In no proper sense of the term were they fellow-servants of the appellee. The brakemen were fellow-servants under the control of these two officers who represented the corporation. Their acts were its acts, and their neglect or that of the fireman, if he was permitted to act as engineer, was the neglect of the company. It was constructively present in them." And in *Louisville, etc., R. Co. v. Brook*, 83 Ky. 129, it was held that a railroad company was liable to a brakeman who was injured through the negligence of an engineer.

§ 47. *Alabama.*

A decision from this state has been cited in a recent text book¹ as supporting the limitation. This is the case of *Walker v. Bolling*.² All this case decides is, that where there is a general manager or superintendent who is invested by the common employer with the duty and authority of employing and dismissing the inferior servants or agents who are under him, the master is responsible for acts of negligence on the part of the superintendent in failing to exercise due care and diligence in employing competent agents, or in not dismissing those who are proved to be incompetent; that the master is bound to use ordinary care toward his servant, and not expose to unnecessary risks; and this duty he does not discharge when he associates with him in a service of peril those who are wanting in ordinary skill and prudence.

To supply suitable and competent fellow servants is one of the first duties of the master. The servant who performs this duty represents him. So far, then, from this case affirming the superior servant doctrine, it is one of the most common applications of the ordinary and correct rule. A later decision goes to the extent of holding that when the duties entrusted to an officer are such as cannot properly be performed by the corporation itself, its president, or board of directors, then his negligence is not that of the corporation, unless it has failed to exercise due care in the selection of a proper officer. It was accordingly adjudged in an action by a fireman on a construction train, to recover from a railroad company for personal injuries from the engine being run into a section washed out by recent rains, that the roadmaster whose duty it was to look after the track and roadbed was a fellow servant of the fireman.³

1. Beach, Contrib. Neg. § 110.
2. 22 Ala. 294.

3. *Mobile & M. R. Co. v. Smith*,
59 Ala. 245.

This decision, however, is clearly opposed to the weight of authority.¹

§ 48. Connecticut.—

The Supreme Court of Errors of this state follow the general rule. The only case that has been cited to support the limitation is that of *Wilson v. Willimantic Linen Co.*,² where the negligence of a factory superintendent in respect to machinery was held to be the negligence of the proprietors. The Court, in effect, states the rule to be that where the master instead of attending personally to the duty of providing a reasonably safe place for his servants to work and reasonably safe appliances, employs another who does it negligently, so that a servant receives an injury by reason of the negligence, the master is liable. The Court cites and follows cases from Massachusetts, Vermont, New York and other states where the limitation is denied.

§ 49. Georgia.—

The courts of this state are inclined to favor the limitation. In a case decided in 1882,³ Chief Justice Jackson, speaking for the Court, said: "A corporation acts only through agents, and unless responsible for their acts is wholly irresponsible. The agent who represents the corporation as master over other employes for the time is in the shoes of the corporation, and whether they fit him, and he wears them with propriety or not, is their concern, for the reason that the corporation employs him, and puts others under him as a skilled and prudent manager. * * * From the president and general superintendent down to the

1. See *ante* § 29.

Conn. 285; s. c., 23 Am. & Eng. R.

2. 50 Conn. 433; s. c., 47 Am. R. Cas. 438.

Rep. 653; see also *Burke v. Norwich & W. R. Co.*, 34 Conn. 479; *Darri- gan v. New York & N. E. R. Co.*, 52

3. *Atlanta Cotton Factory Co. v. Speer*, 69 Ga. 137; s. c. 47 Am. Rep. 750.

smallest child who labors day or night, all the servants of this creature of the law, this impersonal entity, are co-employees, differing only in the character of their work and the amount paid them for it. If no co-employee can recover for the negligence of another, it must follow that no servant of a corporation can recover from it, no matter what it does, for it does nothing except by an employee. It would be thus to except corporations from the rule that a master is responsible to his employee for torts and careless and reckless disregard of life and limb. It would be to endow the artificial person with powers which no natural person can possess, and grant that artificial creature immunities which no one of its creators can enjoy himself. It is not sound sense or good policy. It cannot be good law." This case was one where a young girl operative in a factory sued for damages for injuries received by falling through an unguarded elevator hole in the room in which the overseer had placed her with some other operatives to wait until daylight before going home, after working a part of the night.

§ 50. Illinois.—

The limitation is fully adopted in this state. In the recent case of *Chicago & A. R. Co. v. May*¹ Mulkey, J., took occasion to state very explicitly the position of the Court upon this matter: "The true rule on the subject, as we understand it, is this: The mere fact that one of a number of servants who are in the habit of working together in the same line of employment, for a common master, has power to control and direct the actions of the others with respect to such employment will not of itself render the master liable for the negligence of the governing servant, resulting in an injury to one of the others, without regard to other circumstances. On the other

1. 108 Ill. 288; s. c., 15 Am. & Eng. R. R. Cas. 320.

hand, the mere fact that the servant exercising such authority, sometimes, or generally, labors with the others as a common hand, will not of itself exonerate the master from liability for the former's negligence in the exercise of his authority over the others. Every case, in this respect, must depend upon its own circumstances. If the negligence complained of consists of some act done or omitted by one having such authority, which relates to his duties as a co-laborer, with those under his control, and which might just as readily have happened with one of them having no such authority, the common master will not be liable. For instance, if the section boss of a railroad company, while working with his squad of men on the company's road, should negligently strike or otherwise injure one of them, causing his death, the company would not be liable; but when the negligent act complained of arises out of and is the direct result of the exercise of the authority conferred upon him by the master over his co-laborers, the master will be liable. In such case he is not the fellow-servant of those under his charge, with respect to the exercise of such power, for no one but himself, in the case supposed, is clothed with authority to command the others. When a railway company confers authority upon one of its employes to take charge and control of a gang of men in carrying on some particular branch of its business, such employe, in governing and directing the movements of the men under his charge with respect to that branch of its business, is the direct representative of the company itself, and all commands given by him within the scope of his authority are, in law, the commands of the company, and the fact that he may have an immediate superior standing between him and the company makes no difference in this respect. In exercising this power he does not stand upon the same plane with those under his control. His position is one of superiority." Both the earlier and later decisions

are equally emphatic in supporting this rule.¹

§ 51. *Indiana.*—

Authorities from this State have also been cited by text writers in support of the limitation. But nothing can be more certain than that the decisions of this State hold consistently and unambiguously that the master is not rendered liable by the fact that the injured employe is inferior in grade of employment to the one through whose negligence the injury is caused. This Court has repeatedly held that a foreman is a fellow-servant of those working with him, and that for the foreman's negligence in the discharge of his duties as foreman the master is not responsible to a fellow-servant, remarking in one case that "the overwhelming weight of authority sustains this general doctrine, and our own court has been one of its stanchest supporters, as a long line of decisions attest."² This court has also expressly repudiated the doctrine of the Federal Supreme Court enunciated in the Ross case,³ and has laid down the following rules, which cannot be said to savor the least of

1. See *Lalor v. Chicago, etc.*, R. Co., 52 Ill. 401; *Toledo & W. R. Co. v. Ingraham*, 77 Ill. 309; *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302; s. c., 108 Ill. 576; 17 Am. & Eng. R. R. Cas. 564; *Wabash, etc., R. Co. v. Hawk*, 121 Ill. 259; s. c., 31 Am. & Eng. R. R. Cas. 306.

2. *Indiana Car Co. v. Parker*, 100 Ind. 191; *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 366; *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226; *Slat-terly v. Toledo, etc., R. Co.*, 23 Ind. 81; *Ohio, etc., R. Co. v. Hammer-sley*, 28 Ind. 371; *Columbus, etc., R. Co. v. Arnold*, 31 Ind. 174; *Sullivan v. Toledo, etc., R. Co.*, 58 Ind. 26; *Gormley v. Ohio, etc., R. Co.*, 72 Ind. 31; s. c., 5 Am. & Eng. R. R. Cas. 581; *Robertson v. Terre Haute, etc.,*

R. Co., 78 Ind. 77; s. c., 8 Am. & Eng. R. R. Cas. 175; *Boyce v. Fitz-patrick*, 80 Ind. 526; *Drinkout v. Eagle Machine Works*, 90 Ind. 423.

3. In *Indiana Car Co. v. Parker*, 100 Ind. 191, Elliott, J., said: "In a recent case, *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377; s. c., 17 Am. & Eng. R. R. Cas. 501, the Supreme Court of the United States, by a di-vided court, four of the judges dis-senting, laid down a somewhat dif-ferent doctrine, but, as said by a re-cent reviewer, 'it is probable that a doctrine approved by Chief Justice Shaw and uniformly followed by every State except three or four, will hold its own against a bare majori-ty of the Federal Court.' 31 Alb. L. J. 81."

the superior servant limitation : " Servants engaged in the same general line of duty are fellow-servants although one may be a superior and the others may be subordinate servants under his immediate direction and control,"¹ and, " the negligence of a fellow-servant, or co-employee acting as such, will not authorize a recovery in any case, although the fellow-servant or co-employee may be a superior officer, an agent, or a foreman ; but if the superior agent is charged with the performance of the master's duty, then, in so far as that duty is concerned, his acts and his negligence are the acts and the negligence of the master, and not simply those of a co-employee or fellow-servant."²

§ 52. Iowa.—

It is not clear from the decided cases to what extent the limitation prevails in this State. The subject has been regulated by statute as far as railroad employes are concerned, but as to all other employes the common law rule prevails. In a quite recent case³ it was held to be proper for the Court to refuse to instruct the jury that the master " is not liable to the plaintiff for the negligence of its other servants," the Court remarking that " it would preclude a recovery by an employe of a corporation for the negligence of any other employe, *of whatsoever grade he might be.*" * * * We do not feel called upon as the case is now presented to us, to attempt to point out precisely who would be a co-employee in such a case as this, as distin-

1. *Indiana Car Co. v. Parker*, 100 Ind. 191. and employs and discharges men, is to be regarded as a vice principal,

2. *Krueger v. Louisville, etc., R. Co.*, 111 Ind. 51; s. c., 31 Am. & Eng. R. R. Cas. 329. and the person upon whom the care and management of the yard involves in his absence is to be regarded as a temporary vice principal, and his negligence, causing injury to a yard employe, is not the negligence of a co-employee.

3. *Baldwin v. St. Louis, etc., R. Co.* 63 Iowa, 210. In a subsequent appeal of this case, 39 N. W. Rep, 507, was held that a person who has full control of another's timber-yard,

guished from an employe of a higher grade." But it has also been decided that the "principal is not liable for damages sustained by an employe from the negligence of a fellow-servant in the same general service, notwithstanding such co-employe is higher in authority than the one receiving the injury, but is vested with no authority in the general management of the corporation," the Court intimating that in order to render the principal liable he must leave everything in the hands of the superior employe, reserving no discretion to himself.¹ It is true this court has held that an employe charged with the duty of inspecting cars, and a brakeman using such cars, are not co-employees in such sense that the latter cannot recover from the corporation, by the common law, for an injury received through the negligence of the former in failing to properly perform his duties.² But this result would be reached in any common law court where the correct rule was applied, *i. e.*, that the person employed to inspect and repair machinery and appliances represents the master.³

§ 53. *Kansas*.—

In this State the common law rule, as far as it affects the employes of railroad companies, is now abrogated by statute. There are a few *dicta* in the common law decisions which appear to favor the superior servant limitation, but apparently no direct authorities. The case of *Kansas Pac. R. Co. v. Little*⁴ is frequently cited to support it, but an examination of the case will show that this is wrong. The superior servant in this case had entire charge of the machinery, and it was his duty to inspect the derrick, a defect in which caused the injury. In the language of the Court: "If he had been merely a foreman

1. *Peterson v. White Breast, etc.*, 53 Iowa, 595.

Co., 50 Iowa, 673.

3. See *ante*, § 25 *et seq.*

2. *Braun v. Chicago, etc., R. Co.*,

4. 19 Kan. 267.

working under a common employer, a common master, a common principal, along with the other employes, then we suppose under the authorities he would have been only a fellow-servant with the others, and the company would not have been responsible for his negligence towards the others. But he was not merely a foreman working with the others under a common employer." Other Kansas common law authorities are no more favorable to the limitation contended for than this case. Thus, the negligence of a roadmaster, upon whom is imposed the duty of directing the repairs of the road and keeping the roadbed in a safe condition, has been held to be the negligence of the company.¹ And the negligence of a section-boss in failing to keep the roadbed in proper condition, whereby an engineer was injured, has been held to be the negligence of the company,² as it has in all well-considered cases where the question has arisen. But in a quite recent case³ the Court used the following language: "We concede the general rule to be that the negligence of a fellow-servant is one of the risks assumed by the employe, and for which the employer is not liable; but there are exceptions to this general rule, and where the employer places an employe under the control and direction of another, and the latter, in the exercise of the authority so conferred, orders the former into a place of unusual danger, and thus exposes him to unusual peril, of the existence and extent of which he is not advised, the master is liable; and we think this case comes within the exceptions to the general rule. Here the employer placed deceased under the direction and control of a co-laborer, and was ordered by him to

1. *Atchison, etc., R. Co. v. Moore*, 31 Kan. 197; s. c. 15 Am. & Eng. R. R. Cas. 312; *Atchison, etc., R. Co. v. Moore*, 29 Kan. 632; s. c., 11 Am. & Eng. R. R. Cas. 243.

ver, 35 Kan. 412. In this case the doctrine of the *Ross* case (112 U. S. 377) is termed "extreme."

3. *Missouri Pac. R. Co. v. Perego*, 36 Kan. 424.

2. *St. Louis, etc., R. Co. v. Wea-*

move a trestle, to do which would place him under the engine frame, a place of hazard and danger of which he was entirely ignorant." The deceased in this case, however, was an ignorant and inexperienced boy, and according to the rule laid down in another section,¹ the company was properly held liable for his injury.

§ 54. **Maryland.**—

One case from this State has been brought forward to bolster up the doctrine, *Cumberland, etc., R. Co. v. State*.² It decides that the agents of a railroad company, intrusted with the duty of purchasing a locomotive, are not to be regarded as the fellow-servants of those operating it; one of the most common applications of the rule that the party performing the master's duty of furnishing suitable machinery represents him. It may be superfluous to observe that this case no more supports the superior servant limitation than it denies the fellow-servant rule entirely.³

§ 55. **Michigan.**—

It is incorrect to say that any of the decisions of this State support the superior servant limitation as such. A few of them might be supposed, on a superficial examination, to maintain the position of the Ohio and Kentucky courts, but on looking at the facts in each case it will be found that all of them can be placed on grounds perfectly consistent with the correct and generally accepted rules. Thus the case of *Quincy Mining Co. v. Kitts*⁴ decides nothing more than that a master cannot, by delegating it to another, relieve himself of the duty of exercising due care in the employment and retention of competent servants; and if he does delegate it to a general manager, foreman, or superintendent, he remains responsible.⁵ Judge

1. § 39.

more, etc., *R. Co. 20 Md. 212.*

2. 44 Md. 283; s. c., 45 Md. 229.

4. 42 Mich. 34.

3. See also *O'Connell v. Balti-*

5. See § 37, *ante.*

Cooley delivered the opinion of the Court, and the only portion of it which it is possible to construe as supporting the limitation is the following: "In other words, while the servant assumes the risk of the negligence of fellow-servants, he does not assume the risk of negligence in the master himself, or in any one to whom the master may see fit to entrust his superintending authority." Even this language might be unobjectionable, but it is unnecessary to consider it, as it was unnecessary to the decision. The case of *Chicago, etc., R. Co. v. Bayfield*¹ was a case where an inexperienced minor servant, employed as a laborer on a construction train, was injured while obeying an order of the superintendent of the train to act as brakeman. The Court held, Judge Cooley again writing the opinion, that the act of the superintendent was the act of the company, saying: "We also think that where the superior servant, by means of an authority which he exercises by delegation of the master, wrongfully exposes the inferior servant to risks and injury, the master must respond." This is nothing but a statement of the generally accepted doctrine that it is the duty of the master who knowingly employs youthful inexperienced servants and subjects them to the control of another servant, to see that they are not employed in a more hazardous position than that for which they were engaged, and the person performing this duty represents the master.² In *Ryan v. Bagaley*,³ a mining captain having entire and absolute management of a mine independent of the owner, was held not to be a fellow-servant of the other employes, and the master is liable for his negligence injuring them, although he was not appointed directly, but by the owner's agent. The report of the case does not indicate the nature of the act the mining captain was performing, and owing to the negligent performance

1. 37 Mich. 204.

2. See *ante* § 39, 40.

3. 50 Mich. 179; s. c., 45 Am. Rep.

35.

of which the subordinate servant was injured, but the principle on which the case is based is the generally accepted one that a master giving the control of his entire business to an agent is responsible for his negligence. The idea that the case supports the superior servant limitation is refuted by the remark made by Chief Justice Graves, who said: "He was not in a true sense a mere foreman, or department leader, or superior, or chief, in a given sphere of the mining operations."

The question came squarely before the Court in the case of *Rodman v. Michigan Cent. R. Co.*,¹ where it was held, by a divided court, that a brakeman cannot recover against a railroad company for an injury received in consequence of the conductor managing the locomotive in the engineer's absence. It was directly pressed upon the Court that the conductor was the agent of the company and had charge of the train and command of the other employes on the train, including the plaintiff, and that in the discharge of this duty the conductor was not a co-servant, but the representative of the company. But the Court affirmed a judgment denying such liability by an equal division, Chief Justice Cooley writing the opinion for affirmance. There is nothing in the other cases from this State which can properly be called in to support this almost defenceless doctrine.²

§ 56. Missouri.—

In a case decided in 1873³ the Supreme Court of Missouri laid down a rule which, while consistent with its previous decisions, has not been followed unswervingly since that time. After observing that the servant on entering upon the employment is presumed to know and assume

1. 55 Mich. 57.

R. Co., 55 Mich. 437; *James v. Em-*
met Mining Co., 55 Mich. 336.

2. *Hoar v. Merritt*, 62 Mich. 386;

Gardner v. Michigan Cent. R. Co.,

58 Mich. 585; *Hilts v. Chicago, etc.*,

3. *Brothers v. Carter*, 52 Mo. 373;
s. c. 14 Am. Rep. 424.

the risk of danger from injury by the negligence of fellow-servants, and asking, "But does he risk the carelessness and negligence of those placed over him, in the selection of suitable materials, machinery, and appliances incident to the employment," the Court say: "If the master deposes the superintending control of the work, with the power to employ and discharge hands, and purchase and remove materials, to an agent, then the master acts through the agent and the agent becomes the master. The duties are the duties of the master, and he cannot evade the responsibilities which are incident and cling to them by their delegation to another. *When the master appoints some other person to perform these duties, then the appointee represents the master, and though in their performance he may be and is a servant of the master, yet, in those respects he is not a co-servant, a co-laborer, a co-employee, in the common acceptance of these terms.*" Taken altogether and viewed as an entirety this rule perfectly accords with the true common law doctrine, and cannot be said in the least to follow the Ohio and Kentucky limitation as to superior servants, having control over their subordinates, being representatives of the master. In addition to this, this court has distinctly refused to hold that an employer can be charged with the negligence of one who is merely a foreman over another servant, not engaged in a distinct department of general service, but in the same work with the general servant, and not charged with any executive duties or control over him, which would constitute the superior the agent of the employer.¹ Many decisions apply the ordinary rule that where injuries to servants happen through the negligence of a fellow-servant, no action can be maintained against the master unless his employment is attributable to want of ordinary care,² and most of those

1. *Marshall v. Schriker*, 63 Mo. etc., R. Co., 92 Mo. 359.

509. Compare *Smith v. Wabash*, 2. *Gibson v. Pacific R. Co.*, 46 Mo.

cases holding the master liable where the question has been raised, can be upheld without the support of the limitation. Thus a section foreman who failed to keep the roadbed in repair, whereby a brakeman was injured, has been held to represent the master;¹ and a superintendent having charge of machinery;² and a foreman hiring an inexperienced boy and placing him to work with dangerous machinery;³ and a train dispatcher of a railroad, who has the control of the movement of its trains, and to whose orders the conductors and engineers are subject;⁴ and a master mechanic and wreck master supplying improper appliances for coupling cars whereby a bridge carpenter was injured.⁵ But in several recent cases the Court has undoubtedly inclined towards the limitation, and neglected the application of the rule laid down in *Brothers v. Carter*,⁶ viz.: that it is the act out of the negligent performance of which the injury arose which determines whether the servant performing it is a fellow-servant of the employe injured, or a representative of the master. This is noticeable in the case of *Moore v. Wabash, etc., R. Co.*⁷ In that case it appeared that the company had established a rule requiring all car repairers, when engaged in repairing cars, to set out red flags on each side of the place where they were at work as signals of warning to approaching trains. Notwithstanding this rule, the foreman of car repairs directed the plaintiff, without any flags being set out, as required by such

163; *McDermott v. Pacific R. Co.*, 30 Mo. 115; *Rohback v. Pacific R. Co.*, 43 Mo. 187; *Brothers v. Carter*, 52 Mo. 373; s. c., 14 Am. Rep. 424; *Thorpe v. Missouri Pac. R. Co.*, 89 Mo. 65c. Compare *Gormley v. Vulcan Iron Works*, 61 Mo. 492.
 1. *Lewis v. St. Louis, etc., R. Co.*, 59 Mo. 495; s. c., 21 Am. Rep. 385. See *ante* § 29.
 2. *Brothers v. Carter*, 52 Mo. 373; s. c., 14 Am. Rep. 424.
 3. *Dowling v. Allen*, 74 Mo. 15; s. c., 41 Am. Rep. 298.
 4. *Smith v. Wabash, etc., R. Co.*, 92 Mo. 359.
 5. *Tabler v. Hannibal & St. Jo. R. Co.*, 93 Mo. 79; s. c., 31 Am. & Eng. R. R. Cas. 185.
 6. 52 Mo. 373.
 7. 85 Mo. 588.

rule, to repair the drawhead of a car, promising to protect him while so engaged, and an engine ran against the car severely injuring him. The company was held liable on the ground that the foreman was the *alter ego* of the company, and his promise of protection was binding, although the rule provided to secure the safety of the men had not been observed, but dispensed with. And in another case¹ the Court said: "The law is well settled, in this State and many others, that where the master appoints an agent with a superintending control over the work, and with power to employ and discharge hands, and direct and control their movements in and about the work, the agent, in respect of such matters, stands in the place of the master. His negligence is the negligence of the principal, and for which the latter is liable." Other cases also have taken this view,² and the Court may now be said to be on the side of those favoring the limitation.

§ 57. *Nebraska.*—

The Ohio cases are followed in this State, and the limitation therefore prevails to its fullest extent. In *Chicago, etc., R. Co. v. Lundstrum*,³ Cobb, C. J., after quoting the rule laid down by Judge Ranney of that State,⁴ says: "I think the law thus established and laid down in Ohio prevails substantially throughout the Western States, and will ultimately prevail everywhere." It has accordingly been

1. *Stephens v. Hannibal, etc., R. Co.*, 86 Mo. 221; s. c., 28 Am. & Eng. R. R. Cas. 538.

2. A road master of a railroad, having general superintendence of its track, while engaged in superintending and directing the removal of a wrecked train, but not in the manual work of removing a wreck, who gives a wrong signal to the engineer of a train assisting in removing the wreck, whereby a laborer en-

gaged in the work of removal is injured, has been held to be a vice principal. *Hoke v. St. Louis, etc., R. Co.*, 88 Mo. 360. See also *Stephens v. Hannibal, etc., R. Co.* (Mo. 1888), 9 S. W. Rep. 589; *McDermott v. Hannibal, etc., R. Co.*, 87 Mo. 285; s. c., 28 Am. & Eng. R. R. Cas., 528.

3. 16 Neb. 254; s. c., 21 Am. & Eng. R. R. Cas. 528.

4. *Cleveland, etc., R. Co. v. Keary*, 3 Ohio St. 201.

held that a conductor of a construction train on a railroad, with a gang of laborers, is as to such men a vice principal and not a fellow-servant;¹ also that a foreman of a company of men engaged in the business of repairing bridges, water-tanks, etc., on a line of railway, who has power to control and direct the movements of the men, will render the company liable for acts of negligence committed by him, whereby one of the men under his control is injured.²

§ 58. New York.—

No other Court in this country has insisted so persistently as the New York Court of Appeals upon the rule which has been adopted in this work as the true test of fellow-service, viz.: in the character of the act being performed by the offending servant, or whether the person whose *status* is in question is charged with the performance of a duty which properly belongs to the master. It has stated again and again that this is the only true rule,³ and although its decisions may not have been always quite consistent with it, there can be no doubt that it is the doctrine to be gathered from them as an entirety, and the placing of this State in the column of those who follow the superior servant limitation is erroneous. A number of the decisions of this court, however, have been cited by text writers as supporting the limitation.⁴ It will be profitable

1. *Chicago, etc., R. Co. v. Lundstrum*, 16 Neb. 254; s. c., 21 Am. & Eng. R. R. Cas. 528.

2. *Sioux City, etc., R. Co. v. Smith* (Neb.), 36 N. W. Rep. 285. See also *Burlington, etc., R. Co. v. Crockett*, 19 Neb. 138; s. c., 24 Am. & Eng. R. R. Cas. 390; *Smith v. Sioux City, etc., R. Co.*, 15 Neb. 583; s. c., 17 Am. & Eng. R. R. Cas. 561; *Sioux City & Pac. R. Co. v. Smith* (Neb. 1888), 36 N. W. Rep. 285.

3. *Flike v. Boston & A. R. Co.*, 53

N. Y. 549; s. c., 13 Am. Rep. 545; *Crispin v. Babbitt*, 81 N. Y. 516; s. c., 37 Am. Rep. 521; *McCosker v. Long Island R. Co.*, 84 N. Y. 77; s. c., 5 Am. & Eng. R. R. Cas. 564; *Corcoran v. Holbrook*, 59 N. Y. 517; s. c., 17 Am. Rep. 369; *Hussey v. Cogger* (N. Y. 1889), 20 N. E. Rep. 556.

4. Mr. Beach, in his valuable book on Contributory Negligence, cites the following: *Fuller v. Jewett*, 80 N. Y. 46; s. c., 36 Am. Rep. 575; *Booth v. Boston, etc., R. Co.*, 73 N.

to examine these decisions briefly and see whether the Court deciding them looked to the act which the employe, for whose negligence it was sought to hold the master liable, was performing, or to his grade or station. *Corcoran v. Holbrook*¹ was a case where the general agent of the proprietors of a cotton-mill was held to represent his principals in neglecting to repair certain machinery, the defects in which he was aware of. The Court held that he could not be considered a fellow-servant of an employe who was injured while using such machinery, Rapallo, J., remarking: "*As to the acts which a master or principal is bound as such to perform toward his employes, if he delegates the performance of them to an agent, the agent occupies the place of the master, and the latter is deemed present, and liable for the manner in which they are performed.*" In *Flike v. Boston & A. R. Co.*² an employe of a railroad company, whose duty it was to make up and dispatch trains and to employ and station brakemen thereon, sent out a train without the requisite number of brakemen, owing to which one of the train men was killed. It was held that such employe was not a fellow-servant, but an agent representing the company, whose duty it was to provide a sufficient number of brakemen, and as they had delegated this duty to one of their employes, they were liable for his negligence in the performance of it. Chief Justice Church said: "The true rule, I apprehend, is to hold the corporation liable for negligence or want of proper care in respect to such acts and duties as it is required to perform and discharge as master or principal, *without regard to the rank*

Y. 38; s. c., 29 Am. Rep. 97; *Flike* 573; *Corcoran v. Holbrook*, 59 N. Y. v. Boston, etc., R. Co., 53 N. Y. 549; 517; s. c., 17 Am. Rep. 369.
s. c., 13 Am. Rep. 545; *Crispin v.* 1. 59 N. Y. 517; s. c., 17 Am. Rep. 369.
Babbitt, 81 N. Y. 516; s. c., 37 Am. Rep. 521; *McCosker v. Long Island* 2. 53 N. Y. 549; s. c., 13 Am. Rep. 545.
R. Co., 84 N. Y. 77; *Malone v. Hathaway*, 64 N. Y. 5; s. c., 21 Am. Rep.

or title of the agent intrusted with their performance. As to such acts the agent occupies the place of the corporation, and the latter should be deemed to be present, and consequently liable for the manner in which they are performed. If an agent employs unfit servants his fault is that of the corporation because it occurred in the performance of the principal's duty, although only an agent himself. So in providing machinery or materials, and in the general arrangement and management of the business, he is in the discharge of the duty pertaining to the principal." *Crispin v. Babbitt*¹ is an exceptionally strong case upon this point. Here an agent of defendant, having entire management and control of his iron works, carelessly let steam on an engine near which plaintiff was working, whereby plaintiff was injured. The trial court charged that the agent represented defendant only in respect to the duties confided to him as managing agent, but refused to charge that as to other duties he was to be regarded as a fellow-servant with the plaintiff, and left it as a question of fact. The Court of Appeals held that such refusal was error. Rapallo, J., in the course of his opinion, said: "The liability of a master does not depend upon the grade or rank of the employe whose negligence causes the injury * * * however low the grade or rank of the employe, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master, which he has confided to such inferior employe. * * * the act (letting on the steam) was the act of a mere operative, for which the defendant would be liable to a stranger, but not to a fellow-servant of the negligent employe."

In all of the latter, as well as the earlier decisions of this court, the principles enunciated in the cases above set forth are strictly adhered to.² There have been a number of

1. 81 N. Y. 516; s. c., 37 Am. Rep. 521.

2. *Malone v. Hathaway*, 64 N. Y. 5; s. c., 21 Am. Rep. 573; *Wright*

dissenting opinions, but the dissents were not as to the principle, but to the application of it to the facts and circumstances of the cases.

§ 59. North Carolina.—

Up to the time of the decision of the recent case of *Patton v. Western North Carolina R. Co.*¹ there was little, if anything, in the few decisions of this court² on the fellow-servant question which could be construed as supporting the superior servant limitation. By this decision, however, the Supreme Court of North Carolina adopts the limitation without reserve, and places itself on a line

v. New York Cent. R. Co. 25 N. Y. 562; *Hoffnagle v. New York Cent. R. Co.*, 55 N. Y. 608; *Warner v. Erie R. Co.*, 39 N. Y. 468; *Sherman v. Rochester, etc., R. Co.*, 17 N. Y. 153; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; s. c., 10 Am. Rep. 117; *McCosker v. Long Island R. Co.*, 84 N. Y. 77; s. c., 5 Am. & Eng. R. R. Cas. 564; *Fuller v. Jewett*, 80 N. Y. 46; s. c., 1 Am. & Eng. R. R. Cas. 109; *Mehan v. Syracuse, etc., R. Co.*, 73 N. Y. 585; *Ryan v. Fowler*, 24 N. Y. 410; *Bushby v. New York, etc., R. Co.*, 107 N. Y. 374; *Scarff v. Metcalf*, 107 N. Y. 211; *Pantzar v. Tilly Foster Mining Co.*, 99 N. Y. 368; *Rochester, etc., R. Co. v. Brick*, 98 N. Y. 511; s. c., 21 Am. & Eng. R. R. Cas. 605.

1. 96 N. Car. 455; s. c., 31 Am. & Eng. R. R. Cas. 298, decided in 1887.

2. *Kirk v. Atlanta & C. A. R. Co.*, 94 N. Car. 625; s. c., 25 Am. & Eng. R. R. Cas. 507; *Dobbin v. Richmond & D. R. Co.*, 81 N. Car. 446; s. c., 31 Am. Rep. 512; *Cowles v. Railroad Co.*, 84 N. Car. 309; s. c., 2 Am. & Eng. R. R. Cas. 90; *Hardy v. Carolina Cent. R. Co.*, 76 N. Car. 5. In delivering the opinion of the Court in

the case of *Dobbin v. Richmond & D. R. Co.*, 81 N. Car. 446, *Ashe, J.*, said: "To impute the negligence of such an agent to the master, he must be more than a mere foreman to oversee a batch of hands, direct their work under the supervision of the master, see that they perform their duty, and in case of dereliction, report them. He must have entire management of the business, such as the right to employ hands and discharge them, and direct their labor, purchase material, etc. He must be an agent, clothed, in this respect, with the authority of the master, to whom the laborers are put in subordination, and to whom they owe the duty of obedience. Such an agent is what is known as a 'middle-man,' who, as well as the laborer, is the servant of the master; and although he may work with the laborer in furthering the common business of the master, he is yet not a fellow-servant in the sense of that term as used by the courts, because he represents the master in his authority to direct, control, and manage the business."

with the courts of Ohio, Kentucky, and the United States Supreme Court. In this case it appeared that a section-master in defendant's employ ordered the plaintiff, a new section-hand, to jump from a swiftly-moving train, whereby he was severely injured. In an action against the company to recover for the injury, the complaint alleged that the section-master was agent and servant, and had full power and authority of defendant to hire and discharge hands and servants, and who was the superior of the plaintiff, and whose orders the plaintiff was bound to obey. Evidence was introduced to prove this allegation, and the jury found by their verdict that it was true. The Court held that the section-master was not the fellow-servant of the plaintiff, and the company was accordingly held liable. The Court made no inquiry whatever to discover whether the act of the section-master, out of which the injury arose, was one which the duties of the master to his servants requires him to perform. It seemed to content itself with the fact that the section-master occupied a superior position, having power to command, and to hire and discharge hands.¹ Merriman, J., said: "There seems to be no well-settled rule that classifies the agents and servants of a common employer, whether natural or artificial, first, into such as have authority to represent, act for and in the place of, the employer in respect to the persons, business matters, and things wherewith they are charged; and, secondly, such as have no such authority, but are merely fellow-servants. But without regard to such rule, there is no reason why such authority may not be specially conferred upon any such agent or servant. In this case the burden of proving

1. In view of the fact that the power of the section-master to hire and discharge hands was considered as such an important element in this case, it is curious to note that very soon after, in deciding the case of *Webb v. Richmond & D. R. Co.*, 97 N. Car. 387, it was decided that the fact that a co-employee has authority from the common master to discharge his fellow-servants does not constitute him a vice principal.

the authority, its extent and compass, by competent evidence, would rest upon the party alleging it, unless the nature of the agency or employment implied its existence and extent. Thus an employer might confer upon a particular laborer charged to do a particular sort of service, but who simply, by the nature of his employment, would have no authority to represent or bind his principal in any respect, power to employ other like laborers with himself to do the service to be done, to direct and command them when, where, and how to work, to control and superintend them, and to discharge them from employment in his discretion, although he should labor with and as one of them. And there can be no question that the employer would be answerable for the misfeasance or non-feasance of such agent in the course of his employment, and in the exercise of the power thus conferred upon him. This is so because the agent in such case would be expressly authorized to represent, act for and in the place of, his employer in the business designated, and within the compass of power conferred. And so, in the case before us, although the section-master or foreman might not have had authority, arising from the nature of his employment, to bind the defendant for his acts towards, and his commands to, his fellow-servants, yet, if the defendant conferred upon him power and authority to employ laborers,—fellow laborers with himself,—to work on the section of the railroad wherewith he was charged, and authority to superintend them, to give them orders and commands in the line of the work to be done, which they were bound to obey, and to discharge them from such employment in his discretion, as alleged in the complaint, and as the evidence introduced on the trial tended to prove, the defendant would be liable for his misfeasances and non-feasances in the course of the exercise of his authority thus conferred by it. This is so upon the plainest principles of law applica-

ble to and governing the relations of principal and agent towards each other and third persons.

“This case is not like the ordinary one of injury done by one fellow-servant, acting as foreman or leader of several or many laborers, to one of his fellow-servants. The complaint expressly alleges that the section-master named was agent and servant, and had ‘full power and authority of the said defendant to hire and discharge hands and servants in that behalf on said section, and who was then and there the superior of the said plaintiff in that behalf, whose orders and commands, in the line of said service, as the agent, foreman, and boss of the said defendant, the said plaintiff was lawfully bound to obey;’ and these and other similar allegations to the same effect. Evidence was introduced on the trial to prove this material allegation, and the jury found by their verdict that it was true. So it appeared that the section-master in this case was not simply a fellow-servant of the plaintiff, but as well the agent of the defendant, charged with authority to employ, control, and command the plaintiff as to the labor he should do on the railroad of the defendant while he was so in its service, and to discharge him from such service,—just as its president or other leading executive officer might have done; and the defendant must therefore be held liable for his misfeasance in the course of his agency, just as if the same had been done by its chief executive officer.”

§ 60. *Pennsylvania.*—

In one of the most recent cases¹ decided by the Supreme Court of this State, on the subject of fellow-servants, the correct test as to who are fellow-servants is plainly applied. In this decision it is adjudged that a train dispatcher, wielding the power and authority of a railroad company in the moving of trains, in the changing of schedules or the making of new ones as exigencies require

1. *Lewis v. Seifert*. 116 Pa. St. 628.

is not a fellow-servant with a train employe; and for his negligence, which is the proximate cause of an injury to such employe, the company is liable. Mr. Justice Paxson, in delivering the opinion of the Court, said: "It is very plain that it was the duty of the defendant company, as between said company and its employes, to provide a reasonably good and safe road, and reasonably good and safe cars, locomotives, and machinery for operating its road. It is equally clear that it was its duty to frame and promulgate such rules and schedules for the moving of its trains as would afford reasonable safety to the operatives who were engaged in moving them. This is a direct, positive duty which the company owed its employes, and for the failure to perform which it would be responsible to any person injured as a consequence thereof, whether such person be a passenger or an employe. It would be a monstrous doctrine to hold that a railroad company could frame such schedules as would inevitably or even probably result in collisions and loss of life. This is a personal positive duty; and, while a corporation is compelled to act through agents, yet *agents in performing duties of this character, stand in the place of and represent the principal*. In other words, they are vice principals." Other Pennsylvania cases, both those holding that the offending servant represented the master, and those deciding that he did not, but occupied merely the position of a fellow-servant, seem to have been decided upon this issue, viz.: What was the master's duty to the servant? Thus, the negligence of an agent of a steamship company in supplying an insufficient rope, has been held to be the negligence of the master;¹ and the superintendent of a railway company who had been notified by a conductor of a defective switch, but neglected to repair the same.² And where an engineer and fireman

1. *Mullan v. Philadelphia & S. M. S. S. Co.*, 78 Pa. St. 25; s. c., 21 Am. Co., 76 Pa. St. 389; s. c., 18 Am. Rep. 2.

2. *Patterson v. Pittsburg & C. R. Co.*, 76 Pa. St. 389; s. c., 18 Am. Rep. 412.

were killed by the explosion of a locomotive which had been recently and insufficiently repaired in the shops of the railroad company, it was held that the company was not relieved from liability, although the repairers and the deceased were under the same superintendent.¹

On the other hand, a "mining boss" of a coal company has been held to be a fellow-servant of a "driving boss";² and a car inspector and a brakeman;³ and a draftsman and a carpenter;⁴ and a millwright and a carpenter;⁵ and a brakeman and a conductor;⁶ and a laborer on a construction train and the conductor;⁷ and an employe in an engine yard and an engineer;⁸ and a station-master and an engineer;⁹ and a foreman of a gang and one of his subordinates;¹⁰ and a switchman and a gasfitter;¹¹ and an employe engaged in operating a steam hammer and an employe making repairs.¹² In fact, in not one of the decisions of this court does the limitation receive recognition. On the

1. *Pennsylvania & N. Y. Canal & Co. v. Hughes*, 119 Pa. St. 301.

2. *R. Co. v. Mason*, 109 Pa. St. 296; s. c., 58 Am. Rep. 722, Gordon, J., observed: "Nor are those agents who are charged with the business of supplying the necessary machinery to be regarded as fellow-servants, but rather as charged with the duty which the master owes to the servant, and the neglect of such agent is to be regarded as the neglect of the master." The negligence of the superintendent of a railway company in hiring an incompetent conductor has been held to be the negligence of the company. *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104.

3. *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Delaware & H. Canal Co. v. Carroll*, 89 Pa. St. 374; *Waddell v. Simoson*, 112 Pa. St. 567; *Reese v. Biddle*, 112 Pa. St. 72.

4. *Philadelphia & R. R.*

—10.

5. *Baird v. Pettit*, 70 Pa. St. 477.

6. *National Tube Works v. Bedell*, 96 Pa. St. 176.

7. *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104; s. c., 80 Am. Dec. 467.

8. *Ryan v. Cumberland U. R. Co.*, 23 Pa. St. 384. Compare *O'Donnell v. Allegheny V. R. Co.*, 59 Pa. St. 239.

9. *Keys v. Pennsylvania R. Co. (Pa.)*, 3 Atl. Rep. 15.

10. *Dealey v. Philadelphia, etc., R. Co. (Pa.)*, 4 Atl. Rep. 170.

11. *Keystone Bridge Co. v. Newberry*, 96 Pa. St. 246; s. c., 42 Am. Rep. 543.

12. *New York, etc., R. Co. v. Bell*, 112 Pa. St. 400.

13. *Reading Iron Works v. Devine*, 109 Pa. St. 248.

contrary, an examination of them will show that the Court has always inclined toward a somewhat strict application of the rule.

§ 61. *Rhode Island.*—

A single decision in this State gives apparently a qualified support to the limitation. In *Mann v. Oriental Print Works*,¹ a fireman employed to tend an engine fire was called upon by the engineer to assist in throwing on a belt which worked a pump used to fill the boiler. The fireman, being injured by the belt, brought an action for the injury received against the corporation, which employed both the engineer and himself. The following points were adjudged: (1) That if the fireman, although employed only for a fireman, was placed under the orders of the engineer, and was by him suddenly called upon to assist in throwing on a belt, out of his own sphere but within the sphere of duty of the engineer, and was thus subjected to a risk with which he was not acquainted, or to a peculiar and greater risk at that time of which he was not informed or cautioned, the defendant would be liable; (2) that unless the plaintiff fireman had been instructed not to obey the engineer except in the line of the fireman's employment, the engineer was authorized to call upon him for assistance in any matter within the engineer's department and the defendant would be liable, even if there was another person who might more properly be called upon; (3) that if the plaintiff fireman was instructed not to obey the engineer out of the line of his employment, and he chose, notwithstanding, to obey, he could not hold the defendant liable; (4) that if the throwing on and off of the belts was not within the engineer's department, but was confined by the corporation to a belt-fixer, the defendant would not be liable. The liability of the company in this case, it will be

1. 11 R. I. 152.

seen, is predicated upon the fact that the engineer ordered the fireman into an extra hazardous position, to perform a duty outside of that which he was engaged to perform. In another case¹ a brakeman in the employ of a railroad company jumped upon a moving train, and, while climbing up the ladder on the side of the car, was struck by a pile of lumber near the track. The lumber was unloaded and piled there by the direction of the station-agent. In an action against the company for damages it was held that the station-agent was the brakeman's fellow-servant.

§ 62. South Carolina.—

The well-considered case of *Gunter v. Graniteville Manufacturing Co.*² presented this question: Is a workman, employed to keep the machinery of a cotton-mill in repair and in good working order, a co-laborer or fellow-servant with an operative employed to attend to one or more looms as a weaver, in such a sense as to exempt the employer from liability for an injury caused by the negligence of the person employed to keep the looms in repair and proper working order? The Court, after answering this question in the negative, reviewing and following New York and Massachusetts cases, said: "We are aware

1. *Gaffney v. New York, etc., R. Co.*, 15 R. I. 456; s. c., 31 Am. & Eng. R. R. Cas. 265. In this case the Court said: "The station-agent had charge and direction of the premises and the unloading of freight. The lumber was piled beside the track under his direction and authority. But he was not a vice principal. He had no authority over the plaintiff. He could neither hire nor discharge him; nor was the plaintiff, so far as appears, subject to his orders. Both were engaged in a common employment, serving a common principal, and both were

under the same general control. Their duties and authority were different, but they were still fellow-servants. As this very question has been decided upon grounds satisfactory to us, it would be profitless to discuss it further, or to multiply authorities in its support. See *Brown v. Minneapolis & St. L. R. Co.*, 31 Minn. 553; 15 Am. & Eng. R. R. Cas. 333; *Hodgkins v. Eastern R. Co.*, 119 Mass. 419." See also *Brodeur v. Valley Falls Co.* (R. I. 1889), 17 Atl. Rep. 54.

2. 18 S. Car. 262; 44 Am. Rep. 573.

that there are cases, some of which have been cited by appellant, that seem to be in conflict with those above cited ; but an attentive examination of those cases will show that they either ignore, or do not give full weight to what we regard as the *only true test* as to whether the person in question occupies the position of a fellow-servant to the servant who is injured, or is a representative of the master, and that is, *whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master.* * * * If these duties or either of them are negligently performed, and one of the servants thereby sustains an injury, the master is liable, even though he may have intrusted the performance of such duties to subordinates, by whatsoever name they may be called, and even though the master may have exercised due care in the selection of such subordinates." This statement of the rule is exact, and the result is undoubtedly correct. While the rule thus laid down has been avowedly followed in subsequent cases, its application seems to have been unwarrantedly extended. Thus the Court,⁷ has "assumed" that in the control and direction of his squad of hands a section-master was in the performance of duties of the company, and to that extent their representative.¹ And following the United States Supreme Court it has held that the conductor of a train is the representative of the company, and not a fellow-servant with other employes operating the same train, under his orders.² The Court again expressed its confidence in the correctness of the rule laid down in the Gunter case, and said : "Testing this question by this rule, it seems to us clear that unless the conductor of a railroad train is, while in charge of the train, the representative of the company, then the train is being run with-

1. *Couch v. Charlotte, C. & A. R. Co.*, 25 S. Car. 128; *Coleman v. Co.*, 22 S. Car. 557; s. c., 28 Am. & Eng. R. R. Cas. 331. *Wilmington, C. & A., R. Co.* 25 S. Car. 446.

2. *Boatwright v. North Eastern*

out any representative. He has entire charge of the train, and every employe on it is subject to his orders." Surely this is fallacious. To hold that the master is liable for the negligent performance of a duty which he owes to his servants, and apply this rule without definitely ascertaining whether the act, out of the negligent performance of which the injury arose, was one of those personal duties which the master is bound to perform, amounts to nothing. A correct rule is no better than an erroneous one if it is incorrectly applied. Like many another proposition, "the bearing of the remark lies in the application." The correctness of holding that a conductor is not a fellow-servant of a train hand will be considered in another section.¹

In the late case of *Calvo v. Charlotte, etc., R. Co.*,² however, the Court struck the correct application. It held that a locomotive engineer and a section-master of track-workers are not fellow-servants in the sense that the railroad company employing them would not be liable to one for damages resulting to him from the negligence of the other. In delivering the judgment of the Court, Mr. Justice McIver said: "Now, it is well settled that it is the duty of the master, not only to provide his servants in the first instance with suitable and safe machinery and other appliances to do the work for which they are employed, but also to keep the same in proper repair; and any negligence in the performance of such duty, whether done by the master in person or by subordinate agents selected by him for the purpose, would render the master liable for any injury sustained by one of his servants by reason of such negligence. * * * * The question is as to the nature of the duty, not as to the rank or grade of the person employed to perform it. Is it a duty which the master owes to his servants? Under the well-settled rule above

1. See *infra* §§ 69 and 123.

man v. Wilmington, etc. R. Co., 25

2. 23 S. Car. 528; s. c., 28 Am. & S. Car. 446.
Eng. R. R. Cas. 327. And see Cole-

mentioned, we think that nothing can be clearer than that it is the duty of a railroad company to provide a suitable and safe track over which its locomotive engineers and other servants of that class are required to run its trains, and that negligence on the part of those to whom it commits such duty is the negligence of the company."

§ 63. *Tennessee.*—

The limitation prevails in this State to its fullest extent. "The principle upon which our rule is based," say the Court,¹ "to wit, that the master will be liable for injuries resulting to one servant from the negligence of another servant, who is the immediate superior of the first, is based not upon the idea of the relative rank of the two servants, or the general superiority of the one in position, intelligence, or skill, or in the wages received, but upon the ground that the one is placed under the order and direction of the other, and required to submit to and obey such order in the performance of his duties, so that the inferior is placed in the position of servant to the superior. In such cases the superior is held to represent the master." The question presented in most of the decisions of this court, then, is whether the offending servant and the injured servant occupied towards each other the relation of "superior" and "inferior" in the sense indicated. It has accordingly been held that if a section-hand is injured by the negligence of the section-boss the company is liable;² that the negligence of a railway engineer, whereby a brakeman is injured, is the negligence of the company,³ and that a telegraph operator and a conductor are not fellow-ser-

1. *Nashville, etc., R. Co. v. Wheeler*, 10 Lea (Tenn.) 741; s. c., 4 Am. & Eng. R. R. Cas. 633, holding that an engineer is not a "superior" of a brakeman.

2. *Louisville, etc., R. Co. v. Bowles*, 9 Heisk (Tenn.) 866; s. c., 1 Alb. L. J. 119.

3. *East Tennessee, etc., R. Co. v. Collins*, 85 Tenn. (1 Pickle) 227.

vants.¹ In short, where the negligent servant is the superior, permanently or temporarily, of the injured one, having authority to direct or control the latter, the general rule does not apply.²

§ 64. Texas.—

The rule laid down by this court, on the subject under discussion, is found in *Robinson v. Houston & Texas Cent. R. Co.*³ There, Judge Moore, speaking as the organ of the Court, said: "It is urged that the general rule which holds that a servant cannot recover damages from the master for an injury sustained by reason of the negligence of a fellow-servant is not applicable in this case because the injury to appellant resulted from the negligence of the conductor for the time being, to whose direction and control appellant was subjected. For a time, as says Judge Cooley,⁴

1. East Tenn., etc., R. Co. v. De Armond (Tenn.), 5 S. W. Rep. 600.

2. Nashville v. Carroll, 6 Heisk (Tenn.) 347; East Tenn., etc., R. Co. v. De Armond (Tenn.), 5 S. W. Rep. 600; Haynes v. East Tenn. R. Co., 3 Cold. (Tenn.) 222.

3. 46 Tex. 550; followed in Dallas v. Gulf, etc., R. Co., 61 Tex. 196; s. c., 21 Am. & Eng. R. R. Cas. 575.

4. So. Law Rev. April 1876, p. 110. "Since the article of Judge Cooley, above referred to, was published, that learned jurist and author has devoted much time to the study of this question, and treats it quite fully in his work on Torts, published as late as the year 1880. In this work, pp. 542-545, speaking of injuries resulting from the negligence of fellow-servants, he announces his views in the following language: 'The rule which exempts the master from responsibility for injuries to his servants, proceeding from risks inci-

dental to his employment, extends to cases where the injury results from the negligence of other servants in the same employment. Whatever controversy there may have been for a time on this point may now be said, by an overwhelming weight of authority, to have been thoroughly quieted and settled. Some disputes still remain which concern the proper limits of the doctrine, and what, and how many, are the exceptional cases. In some quarters a strong disposition has been manifested to hold the rule not applicable to the case of a servant who, at the time of the injury, was under the general direction and control of another who was intrusted with the duties of a higher grade, and from whose negligence the injury resulted. But it cannot be disputed that the negligence of a servant of one grade is as much one of the risks of the business as the neg-

a strong disposition was manifested in some of the courts to hold to this view. We, however, agree with him that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of another ; and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts or omissions on the part of one class of servants, and not those of another class." While this statement of the law is quite general, it certainly negatives the idea that this court is one of those favoring the superior servant doctrine. On the contrary, its decisions wherein the master has been held liable, are entirely consistent with the rule above laid down, and can be harmonized with the criterion that it is the act performed by the offending servant, and not his station or grade which should be looked at in determining whether the master is liable for his negligence. Thus, it has been held that a master who delegates his power to another, to employ, discharge, and control servants in a given work, is responsible to a servant for an injury received by him through the incompetency of a servant so employed, when such incompetency was known to the person so authorized to make the employment, and was not known, and by the exercise

ligence of a servant of any other ; and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts and omissions on the part of one class of servants, and not those of another class. Nor on grounds of public policy could this distinction be admitted, whether we consider the consequences to the parties to the relation exclusively, or those which affect the public, who in their dealings with the employer may be subjected to risks. Sound policy seems to require that the law should make it for the interest of the servant that he should take care not only that he

be not negligent himself, but also that any negligence of others in the same employment be properly guarded against by him, so far as he may find it reasonably practicable, and be reported to his employer, if needed. And in this regard it can make little difference what is the grade of the servant who is found to be negligent, except as superior authority may render the negligence more dangerous, and consequently increase at least the moral responsibility of any other servant, who, being aware of the negligence, should fail to report it."

of due care could not have been known to the person injured.¹ And a yard foreman whose duty it was to see that the engines of a railway company were in good repair and failed to do so, whereby an employe was injured, has been held to represent the company.² A stock and fuel agent of a railroad company who sustained injury from a defective track, has been permitted to maintain an action against the company, the Court holding that the fact that the company's servants caused the track to be defective, having nothing to do with the case³. In another case⁴, a plumber employed in a railroad company's repair shops was directed by the master mechanic, to whose orders he was subject, to hold a piece of timber between a tender and an approaching engine to prevent a direct collision, and so holding he asked the master mechanic if that was right, to which the latter replied, "Yes, that will do." The engine striking the timber higher up than the buffer of the tender, brought the timber violently against the plumber and severely injured him. The Court held that the company was liable. On the other hand, the general rule exempting the master from liability has been applied in numerous cases so as to entirely discountenance the limitation.⁵

1. *Texas Mexican R. Co. v. Whitmore*, 58 Tex. 277; s. c., 11 Am. & Eng. R. R. Cas. 195.

2. *Houston, etc., R. Co. v. Marcettes*, 59 Tex. 334; s. c., 12 Am. & Eng. R. R. Cas. 231.

3. *Houston, etc. R. Co. v. Rider*, 62 Tex. 267.

4. *Douglas v. Texas Mex. R. Co.*, 63 Tex. 564.

5. *Galveston, etc., R. Co. v. Faber*, 63 Tex. 344; *Texas, etc., R. Co. v. Harrington*, 62 Tex. 597; s. c., 21 Am. & Eng. R. R. Cas. 571; *Houston, etc., R. Co. v. Rider*, 62 Tex. 267; *Mayton v. Texas & Pac. R. Co.*,

63 Tex. 77; s. c., 51 Am. Rep. 637; *Dallas v. Gulf, etc., R. Co.*, 61 Tex. 196; s. c., 21 Am. & Eng. R. R. Cas. 575; *Pilkenton v. Gulf, etc., R. Co. (Tex.)*, 7 S. W. Rep. 805; *Houston, etc. R. Co. v. Willie*, 53 Tex. 318; *Robinson v. Houston, etc., R. Co.*, 46 Tex. 540; *Hamilton v. Galveston, etc., R. Co.*, 54 Tex. 556; *Houston, etc., R. Co. v. Dunham*, 49 Tex. 181; *Houston, etc., R. Co. v. McNamara*, 59 Tex. 255; *East Line, etc., R. Co. v. Scott*, 68 Tex. 694; *Houston, etc., R. Co. v. Gilmore*, 62 Tex. 391.

§ 65. Vermont.—

Justice Ross of the Supreme Court of this State, in an opinion¹ which is certainly entitled to rank as one of the leading authorities on the subject, disposes of the superior servant limitation as follows: "Some courts have held that the master is responsible for the negligence of a servant who had the right to command and did command an under servant, who was injured in the performance of such command or order negligently given. This distinction, however, is not now generally recognized, nor would it seem to be a proper application of the general principles which all agree apply to the relation of master and servant in regard to injuries sustained by the latter in performing the service. The principal diversity in the latter decisions arises in determining the extent of the liability of the master for the negligence of his servant, which causes injury to another servant, *while performing a duty which, by the relation of master and servant, rests upon the master.*" The italicized portion of the above clearly shows the criterion of fellow-service which was in the mind of the writer. It is more definitely stated in the latter portion of the opinion: "When the case of *Hard v. Vermont & Canada R. Co.*² was decided, the liability of the master was held to be dependent upon whether the servant, whose negligence caused the injury, and the servant injured were fellow-servants in a common employment or work. Making this the test for determining the master's liability, the reasoning and conclusions of the late Chief Justice Pierpont are unanswerable. But this test, while determinative of a great number of cases, as we have seen, has been abandoned both in England and in this country, and in lieu thereof the master's liability has been made to rest upon whether the negligence arose in the performance of a duty

1. *Davis v. Vermont Cent. R. R. Co.* 173. 55 Vt. 84; s. c., 11 Am. & Eng. 2. 32 Vt. 473.

for the careful discharge of which he became responsible when he assumed the relation of master to the injured servant." The Vermont Court, then, cannot be said in the least to favor the limitation; but the principles laid down by it accord entirely with the general rule.

§ 66. Virginia.

The position of this court on this question is not clearly defined, but it is evident that the limitation is favored. The leading case is *Moon, Admr., v. Richmond & A. R. Co.*¹ Although the result reached in this and the other decisions of this court may be consistent with the criterion applied in those States where the limitation is denied, yet the rules laid down by the Court seem to approve of it. Fontleroy, J., in the Moon case, said: "The fellow-servant or co-employee for whose negligence the company is *not liable*, is one who is in the same employment, that is, in the same shop or place with, and having no authority over the one injured, and who is no more charged with the discretionary exercise of powers and duties imperatively resting on the company than the injured party; but where a person is placed in charge of the 'construction or repair of machinery,' the 'dispatching of trains,' the 'maintenance of way,' etc., he is not a fellow-servant with those under him, nor with those in a different department of the company's service. He is the agent of the company, which has assumed through him the performance of duties which are absolute and imperative, the omission or the negligence of performing which the law will in no wise excuse." The first part of this statement, it will be seen, goes a great deal further than the latter, which is nothing but the generally accepted rule, and, as has been said, many of the Virginia decisions can be harmonized with it. Thus, an express

1. 78 Va. 745; s. c., 17 Am. & Eng. R. R. Cas. 531. In this case a section hand altering and repairing the road was held not to be a fellow-servant of a train hand injured through his negligence.

messenger employed by the Baltimore & O. R. Co., was injured by a collision of the train on which he was running, with a large rock which had fallen from the side of a cut upon the track. The section hand and track watchman were shown to have knowledge of the probable danger, but did nothing to avert it. In an action to recover for the injury, the Court laid down the rule that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of the employment, except (*a*) where the master himself is not free from negligence, having, for example, provided unsafe machinery, etc., or (*b*) where the injury is caused by the negligence of a servant who is charged with the performance of duties which by law it is incumbent upon the master to perform, such servant being the representative of the master. The Court, therefore, held that the section-boss and watchman, being charged with the master's duty to see that the track was safe, were his representatives.¹ The liability of the master for the neglect of the servant charged with the duty of keeping the track and roadbed safe has also been affirmed in other decisions.² But in holding that the conductor of a railroad train who negligently signals to an engineer while a brakeman is coupling cars, whereby the latter is injured, is not a fellow-servant of such brakeman but a representative of the company, which is liable for his negligence,³ the Court follows the doctrine of the United States Supreme Court, and to a certain extent, at least, upholds the limitation.⁴

1. *Baltimore & O. R. Co. v. McKenzie*, 81 Va. 71; s. c., 24 Am. & Eng. R. R. Cas. 395. (Va.), 33 Am. & Eng. R. R. Cas. 269; *Moon v. Richmond & A. R. Co.*, *supra*; also holds that a conductor is not a fellow-servant of other train hands.

2. *Moon v. Richmond & A. R. Co.*, 78 Va. 745; s. c., 17 Am. & Eng. R. R. Cas. 531; *Torians v. Richmond & A. R. Co.* (Va.), 4 S. E. Rep. 339. .4 *Richmond & D. R. Co. v. Williams* (Va. 1889) 9 S. E. Rep. 990.

3. *Ayres v. Richmond & D. R. Co.*,

§ 67. *West Virginia.*

Whatever application the Court of this State may have made of them, there is no doubt whatever but that the rules it has laid upon this subject accord perfectly with the true criterion that it is the act out of which the injury arose which must be looked to in order to discover whether the offending servant is to be considered a co-employee. The whole subject was maturely considered in the case of *Riley v. West Virginia, etc., R. Co.*¹ The conclusions reached in this case are stated in the syllabus written by the Court: "When a railroad company puts a superintendent, foreman, or other employe in its place, to discharge some duty which it owes to its servants or employes, as to such duty such superintendent or other employe is not a co-servant, but the representative of the company; and as to such duty the company is bound by the acts or omissions of such middle-man, the same as though the acts had been done or omitted by the company itself. Whenever such company delegates to another the performance of a duty to its servants which it has impliedly contracted to perform itself, or which rests upon it as an absolute duty, it is liable for the manner in which the duty is performed by the middleman whom it has selected as its agent; and to the extent of the discharge of these duties by the middleman, he stands in the place of the company, but as to all other matters he is a mere servant. The question in such case is not whether the company reserved to itself any oversight or discretion, but whether it did in fact clothe the middle-man with power to perform its duties to the servant injured." And in another case² it was said: "The rule deduced from these principles and authorities would seem to be that two servants of the same master are not fellow-servants when one acts in a superior capacity to the

1. 27 W. Va. 145.

Co., 28 W. Va. 610; s. c., 57 Am.

2. *Madden v. Chesapeake & O. R.* Rep. 695.

other, *in regard to some duty from the master*, and the master is liable for any injuries to the subordinate caused by the carelessness or negligence of the superior." And in the last expression of the Court upon this subject,¹ Judge Green said: "I think the better considered (views) of recent American cases is, that if a master delegates to a superintendent the performance of certain duties, *to the extent of the discharge of those duties* he stands in the place of the master; but as to all other matters he is a mere co-servant." The superior servant limitation finds no support in these clearly and correctly stated rules.

§ 68. Wisconsin.

The Scots decision of *Dixon v. Rankin*,² denying the doctrine of the fellow-servant rule, came to the notice of this court in 1860, through an Ohio decision.³ Relying on this case, the Court overruled a former decision and decided that a master was liable for an injury to one employe caused by the negligence of a co-servant. In the following year, however, this decision was overruled and the general rule reaffirmed.⁴ None of the decisions of the Court on this question, in which the master is held liable for the negligence of an offending servant, are based upon the mere superiority or superintendence of such servant. On the contrary, all of them are decided with reference to the duties which the master owes to the servant. And no employe has been held to be a vice principal or representative of the master in respect to the performance of a certain act, unless that act was one of the duties which the contract of employment imposes upon the master. The case of *Brabbitts v. Chicago & N. W. R. Co.*⁵ is a leading

1. *Criswell v. Pittsburg, etc., R. Co.* (W. Va.), 33 Am. & Eng. R. R. Cas. 232. 3. *Cleveland, etc., R. Co. v. Keary*, 3 Ohio St. 201.

2. 1 Am. Railway Cas. 569; 14 Court of Sess. Cas. 420 (1854). 4. *Moseley v. Chamberlain*, 18 Wis. 700.

5. 38 Wis. 289.

one. Here a railroad brakeman was injured owing to the defective condition of a switch engine. The foreman of the company's repair shops, who was the person to whom, by the rules of the company, such defect should have been reported, was notified several times of the defects, but failed to make the proper repairs. In an action by the brakeman to recover for the injury, the Court held that the company owed a duty to its employe to keep in proper repair the engine used to propel the train on which the latter was employed; and said foreman, being the person designated by it to whom notice of any defect in the engine was to be given, and whose duty it was to repair it on receiving such notice, his negligence in that behalf was *the negligence of the company*, and the latter was liable for the injury caused thereby. The Court said: "It would be monstrous to allow the defendant to relieve itself from all liability for a breach of that duty by simply charging one of its inferior officers or servants with its performance. We hold, therefore, that the instruction was correct—that notice to the foreman was notice to the defendant; that the negligence of the foreman was the negligence of the defendant, and that the latter is liable to the plaintiff for the injuries received by him because of such negligence." The other decisions of the Court are based upon these correct principles. Thus, a general manager of a railroad who prescribes rules, and a train dispatcher who gives special orders, have been adjudged not to be fellow-servants with the employes in charge of a train.¹ On the other hand it is well settled by the decisions of this court that the mere fact that the offending servant is a foreman does not render the master liable for his negligence.² Strenuous ef-

1. *Phillips v. Chicago, M. & St. P. R. R. Cas.* 578; *Hoth v. Peters*, 55 R. Co., 64 Wis. 475; s. c., 23 Am. & Eng. R. R. Cas. 453. *R. R. Cas.* 405; *Dwyer v. American Ex. Co.*, 55 Wis. 453; s. c., 8 Am. & Eng.

2. *Howland v. Milwaukee, etc., R. Co.*, 54 Wis. 226; s. c., 5 Am. & Eng. *R. R. Cas.* 159; *Schadewald v. Milwaukee, etc., R. Co.*, 55 Wis. 569;

forts have been made to induce the Court to recede from the rule thus settled, and to follow what is characterized as the more humane and reasonable rule adopted in Ohio, Kentucky, and other States. The effort, however, has been unavailing.¹

§ 69. United States Supreme Court.—*Chicago, Milwaukee & St. P. R. Co. v. Ross.*—

Up to 1884 the United States Supreme Court had not passed upon this question. A case came before it in that year, however, wherein the question was squarely presented. This was the case of *Chicago, Milwaukee, & St. Paul R. Co. v. Ross*.² The facts were simple. A freight train conductor, taking his train out of Minneapolis, neglected to notify the engineer of an order which he had received from the train dispatcher. The engineer, without fault, upon his failure to receive the order, by the negligence of the conductor, ran his train into another and was injured. In an action against the company, the Court below, the Circuit for the Minnesota District, instructed the jury that, if the injury occurred by the fault of the conductor, without contributory negligence on the part of the engineer, the company was liable. A verdict was returned for the plaintiff and judgment had thereon. The case was taken to the United States Supreme Court and the judgment was affirmed by a bare majority, Justices Blatchford, Gray, Mathews, and Bradley dissenting. Mr. Justice Field wrote the opinion of the Court. After citing and reviewing a number of American and English decisions,³ he

¹ *Heine v. Chicago, etc., R. Co.*, 58 Wis. 525; *Brabbitts v. Chicago, etc., R. Co.*, 38 Wis. 289; *Peschel v. Chicago, etc., R. Co.*, 62 Wis. 338; s. c., 17 Am. & Eng. R. R. Cas. 545.

² *Heine v. Chicago, etc., R. Co.*, 58 Wis. 525. See dissenting opinion of Cassidy, J., in *Luebke v. Chicago,*

etc., R. Co., 59 Wis. 127; s. c., 15 Am. & Eng. R. R. Cas. 183.

³ 112 U. S. 377; s. c., 17 Am. & Eng. R. R. Cas. 501.

⁴ *Murray v. South Car. R. Co.*, 1 McMullan (S. Car.) 385; *Farwell v. Boston & W. R. Co.*, 4 Metc. (Mass.), 49; *Hutchinson v. York, etc., R. Co.*,

said : " There is, in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters, and other subordinates employed. He is in fact and should be treated as the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will ensure more care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway corporation must apply to all, and many corporations operate every day several trains over hundreds of miles at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length

5 Exch. 343; *Priestly v. Fowler*, 3 York, etc., R. Co., 2 Lansing (N. Y.), M. & W. 1; *Wigmore v. Jay*, 5 Exch. 506, 516; *Malone v. Hathaway*, 64 354; *Bartonshill Coal Co. v. Reid*, 3 N. Y. 5; *Corcoran v. Holbrook*, 59 Macqueen H. L. Cas. 272; *Wilson v. N. Y. 517*; *Little Miami, etc., R. Co. Merry, L. R. 1 Sc. & Div. App. Cas. v. Stevens*, 20 Ohio 415; *Cleveland, 326*; *Holden v. Fitchburg R. Co., etc., R. Co. v. Keary*, 3 Ohio St. 129 Mass. 268; s. c., 2 Am. & Eng. 201; *Louisville, etc., R. Co., v. Collins, 2 Duv. (Ky.) 114.*

of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the term is he a fellow-servant with the fireman, the brakemen, the porters, and the engineer. The latter are fellow-servants in the running of the train under his direction, who, as to them and the train, stands in the place of and represents the corporation.

* * * * There are decisions in the courts of other States, more or less in conformity with those cited from Ohio and Kentucky, rejecting or limiting, to a greater or less extent, the master's exemption from liability to a servant, for the negligent conduct of his fellows. We agree with them in holding—and the present case requires no further decision—that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore that, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner."

While the result of this decision is undoubtedly a recognition and support of the superior servant doctrine, it does not go to the extent that judges and writers have frequently accredited it. Judge McCrary, who delivered the opinion of the Circuit Court,¹ recognized the doctrine that the mere matter of subordination determines the liability of the employer; that wherever one party stands subject to the orders of another party whom the master employs, the negligence of the latter is the negligence of the master; so that if a section-boss is guilty of negligence, whereby a section hand working under him is injured, the company is responsible. While his judgment was affirmed by the

1. *Ross v. Chicago, etc., R. Co.*, 8 Fed. Rep. 544.

United States Supreme Court, yet it declined to commit itself to that doctrine; and, while it affirmed the judgment, did so upon the theory that the party guilty of negligence was the conductor,—one having the sole control and management of a moving train; and said that by virtue of the large control and great responsibility vested in him it was proper to hold him as a representative of the company, its *alter ego*, and his negligence the negligence of the company. The other proposition has never yet been decided by the Supreme Court. It is evident from the opinion that it intentionally declined to pass upon it in the Ross case.¹

The only point then which this case decides is that the negligence of a conductor of a railway train is, as regards the other train hands, the negligence of the master. The real question in the case was one of fact. The superiority of the conductor was not in evidence. Indeed, it has no existence in fact, and in importing this fiction into the case, and then recognizing and applying the superior servant doctrine, the majority of the eminent Court committed gratuitous errors. Thus, the Court assumed that the conductor has the entire control and management of the train. "He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time." This, as has been pointed out,² is seldom the case. "A conductor runs either in accordance with a time-card prepared by the company, which directs 'when the train shall start, at what speed it shall run, at what stations it shall stop, and for what length of time,' etc., or in accordance with telegraphic orders, which determine these points for him. Both conductor and engineer carry these time-cards and are alike guided by them; the telegraphic orders are sent to both, and both are equally bound to obey

1. *Mealum v. Union Pac. R. Co.*, 37 Fed. Rep. 189.

2. *Liability of Employer, etc.*, 20 Cent. L. J. 316.

them. In short, both work under orders of the same superior and for the same end." The decision is contrary to the well-established and almost uniform current of authority, both in this country and in England. It has been severely criticised by eminent writers,¹ and it will not be strange, in view of recent changes in the Court, if, when this question next comes before it, the dissenting Justices will be in the majority. During the four or five years which have elapsed since this case was decided, it is not apparent that it has been followed in or perceptibly influenced any of the State courts which had not already accepted the superior servant limitation. The United States Circuit and District Courts are of course bound by it, and have uniformly followed it.²

1. Mr. Asa Iglehart, of Indiana, reviewing this case in 20 Cent. L. J. 86, concludes his article by saying: "It is much to be regretted that, by an ingenious assumption of the scope of authority of a railroad conductor, the Court, by a mere fiction, should give him a position he does not occupy, and attach a liability to the company for his acts which does not properly belong thereto. It would seem inevitable that any fancied benefit which the Court might contemplate from the change of the rule will be overbalanced by the increase of litigation resulting therefrom.

"Either a conductor is to be designated a vice principal, in contradistinction to all other servants, without regard to his authority, or throughout the range of the relation of master and servant, and the liability of the former for the acts of the latter where these relations and liabilities are involved and litigated, the inquiry will be instituted whether every other servant,

sustaining similar relations to the principal and his fellow-servants to that of conductor, is a vice principal; and that, even though the law, as now settled, recognizes the servant as a fellow-servant with others in a common employment. This must result in much vexatious litigation. But it is not probable that a rule of law so well settled will be unsettled by one opinion, however high the court announcing it; certainly not by any opinion with so shadowy a foundation and rendered by a court so evenly divided. It may rather be predicted that when this question next comes before this court the eminent justices who dissented in this case will be in the majority."

2. *The Titan*, 23 Fed. Rep. 413; *The Carolina*, 30 Fed. Rep. 199; *The Furnessia*, 30 Fed. Rep. 378; *Mason v. Edison Machinery Works*, 28 Fed. Rep. 228; *Garrohy v. Kansas City, etc., R. Co.*, 25 Fed. Rep. 258; *Anderson v. Winston*, 31 Fed. Rep. 528, *Van Wickle v. Manhattan R. Co.*, 32 Fed. Rep. 278; *Naylor v. New York*

§ 70. General Remarks.—Application of the Limitation.—

From the foregoing review of the cases in the States whose decisions have been cited by judges and writers to support the limitation, it will be seen that there are eight, or perhaps ten, States in this country, and the Federal Supreme Court, where the doctrine can be said to prevail, either to its furthest extent, as in Ohio and Kentucky, or to a modified degree. It will also be seen that, except in those States adopting the *ultra* rule that where the master sees fit to place one of his employes under the direction and control of another the relation of fellow-servants does not exist and the latter is the representative of the master, the doctrine is very vague and undefined, and there can be no exact principles evolved out of it. The dividing line to be crossed, which takes an employe out of his class and changes him into a vice principal who represents the superior, and bears his relation to the other employes, so that his negligence becomes the negligence of the superior towards the latter, cannot be determined so as to apply to all the jurisdictions wherein the limitation is recognized. Except in three or four of the States, perhaps, to impute the negligence of such a servant to the master, he must be more than a mere foreman to oversee a gang, direct their work under the supervision of the master, see that they perform their duty, and, in case of dereliction, report

Cent. & H. R. Co., 33 Fed. Rep. 801; he represents the principal, that he Robertson v. Cornelson, 34 Fed. Rep. 716; Central Trust Co. v. Wabash, etc., R. Co. 34 Fed. Rep. 616; Van Avery v. Union Pac. R. Co., 35 Fed. Rep. 40. In Mealman v. Union Pac. R. Co., 37 Fed. Rep. 189; Brewer, J., said: "I think it is necessary not merely that there should be subordination, but that the party in control should have such departmental control—such an extended authority—that the Court may justly say that

is a vice principal; the general superintendent, the superintendent of a division, superintendent of roads and bridges, any party who has a department under his control; and the Supreme Court say that a conductor stands in this category." See also language of the same judge to same effect in Howard v. Denver, etc., R. Co., 26 Fed. Rep. 837; s. c., 24 Am. & Eng. R. R. Cas. 448.

them.¹ As a general rule he must have the management of a department of the master's business, such as the right to employ hands and discharge them, direct their labor, purchase material, etc. He is in this respect considered as an agent, clothed with some of the authority of the master, to whom the laborers are put in subordination, and to whom they owe obedience. Although such a one may work with the laborer in furthering the common business of the master, he is held to be not a fellow-servant in the sense of that term as used by the courts, because he represents the master in his authority to direct, control, or manage the business, or some portion or department of it. Because, in applying this rule the same results are frequently, and in perhaps the majority of cases, reached, it should not be confused with what has been accepted herein as the true criterion of fellow-service. There is a wide difference between them. The one deals almost entirely with the station, rank, or authority of the two servants. The other ignores this altogether, and looks only at the nature of the act out of which the injury arose. It pronounces as a rule of law that where the master owes an obligation to the servant, the duty must be positively and fairly performed, either by the master acting *in persona* or by his agent. The only issue, then, which arises is whether the act which was negligently performed or omitted was one of the duties which the master owed to the servant under the circumstances. As these duties are well understood and have often been defined, the application of the rule is comparatively without difficulty. The doctrine of the superior servant limitation, on the other hand, being princi-

1. *Kirk v. Atlanta & C. A. R. Co.*, St. 287; s. c., 27 Am. Rep. 510; *Sioux City, etc., R. Co. v. Smith*, 22 Neb. 94 N. Car. 625; s. c., 25 Am. & Eng. R. R. Cas. 507; *Peterson v. Whitebreast, etc., Co.*, 50 Iowa, 673; s. c., 32 Am. Rep. 143; *Chicago, etc., R. Co. v. Simmons*, 11 Ill. App. 147; *Berea Stone Co. v. Kraft*, 31 Ohio

775; *Louisville, etc., R. Co. v. Lahn* (Tenn.), 6 S. W. Rep. 663; *New York, etc., R. Co. v. Bell* (Pa.), 28 Am. & Eng. R. R. Cas. 338.

pally an erroneous deduction from the language of the old reports wherein certain servants are called vice principals, is founded upon false theories, and its systematic and consistent application is impossible. It cannot be a correct rule of law.

§ 71. Stipulation by Master for Exemption from Liability for Torts of Superior Servant.—

In a recent Ohio case¹ it was held that the liability of railroad companies for injuries caused to their servants by the carelessness of other employes placed in authority and control over them, is founded upon considerations of public policy, and it is not competent for a railroad company to stipulate with its employes at the time, and as part of their contract of employment, that such liability shall not attach to it. "The policy of our law," said Chief Justice Owen, "being well settled, it only remains for us to inquire whether railroad companies may ignore or contravene that policy by private compact with their employes, stipulating that they shall not be held to a liability for the negligence of their servants which public policy demands should attach to them. The answer is obvious. Such liability is not created for the protection of the employes simply, but has its reason and foundation in a public necessity and policy which should not be asked to yield or surrender to mere private interests and agreements."

1. *Railway Co. v. Spangler*, 44 etc., *R. Co. v. Bishop*, 50 Ga. 465. Ohio St. 471; s. c., 28 Am. & Eng. And see *infra*, § 108. R. R. Cas. 319. Compare *Western*,

CHAPTER V.

THE DIFFERENT DEPARTMENT LIMITATION.

- § 72. The Doctrine Stated.
- 73. Origin of the Doctrine.
- 74. Reasons for the Doctrine.
- 75. Application of the Rule.
- 76. Questions of Fact for the Jury.
- 77. The Doctrine an Exceptional one.

§72. The Doctrine Stated.—

Owing to the fact that the division of labor has led to such growth in modern industrial enterprises, causing them to be divided into distinct and separate departments, some of the courts of this country contend for the following limitation: That in order to constitute servants of the same master fellow-servants it is not enough that they were engaged in doing parts of some work or in the promotion of some enterprise carried on by the master not requiring co-operation, nor bringing the servants together, or into such personal relations that they could have exercised an influence, one upon the other, promotive of proper precaution in respect of their mutual safety, but it is essential either that they were actually co-operating at the time of the injury, in the particular business in hand, or that their usual duties should bring them into habitual consociation, so that such proper caution would be likely to result. This different department distinction has been

called the doctrine of Illinois,¹ Georgia,² Kentucky,³ and Tennessee.⁴ It has been recognized in all of these States, as well as in others.⁵

§ 73. Origin of the Doctrine.—

The doctrine was first judicially recognized in Indiana in the year 1854.⁶ A bridge carpenter was injured through the negligence of a railroad engineer. The Court, in deciding that the company was liable for the injury, said: "If the bridge builder of the company be regarded as a co-servant of the engineer, within the meaning of the Priestly and

1. Toledo, etc., R. Co. v. O'Connor, 77 Ill. 391; Toledo, etc., R. Co. v. Ingraham, 77 Ill. 309; Chicago & N. W. R. Co. v. Moranda, 93 Ill. 302; Ryan v. Chicago & N. W. R. Co., 60 Ill. 171; Chicago, etc., R. Co. v. Moranda, 108 Ill. 576; s. c., 17 Am. & Eng. R. R. Cas. 564; Chicago, etc., R. Co. v. Kelley (Ill. 1889), 21 N. East Rep. 203.
2. Cooper v. Mullins, 30 Ga. 150;
3. Louisville, etc., R. Co. v. Collins, 2 Duv. (Ky.) 114; Louisville, etc., R. Co. v. Cavens, 9 Bush (Ky.) 559.
4. Nashville, etc., R. Co. v. Jones, 9 Heisk (Tenn.) 27; Nashville, etc., R. Co. v. Carrol, 6 Heisk (Tenn.) 347.
5. Moon v. Richmond & A. R. Co., 78 Va. 745; s. c., 17 Am. & Eng. R. R. Cas. 531; Richmond, etc., R. Co. v. Norment (Va.), 4 S. E. Rep. 211; Madden v. Chesapeake & O. R. Co., 28 W. Va. 610; s. c., 57 Am. Rep. 695; Richmond & D. R. Co. v. Williams (Va. 1889) 9 S. E. Rep. 990; Hobson v. New Mexico & A. R. Co., (Ariz.), 28 Am. & Eng. R. R. Cas. 360.
6. Wright v. New York Cent. R. Co., 25 N. Y. 562; Texas & P. R. Co. v. Harrington, 62 Tex. 597; s. c., 21 Am. & Eng. R. R. Cas. 571; Dallas v. Gulf, etc., R. Co., 61 Tex. 196; s. c., 21 Am. & Eng. R. R. Cas. 575; St. Louis, etc., R. Co. v. Welch (Tex.), 10 S. W. Rep. 529; Holden v. Fitchburg R. Co., 129 Mass. 268; s. c., 2 Am. & Eng. R. R. Cas. 94; Brodeur v. Valley Falls Co. (R. I., 1889), 17 Atl. Rep. 54; New York, etc., R. Co. v. Bell, 112 Pa. St. 400; s. c., 28 Am. & Eng. R. R. Cas. 338; Keystone Bridge Co. v. Newberry, 96 Pa. St. 246; s. c., 42 Am. Rep. 543; Kirk v. Atlanta, etc., R. Co., 94 N. Car. 625; s. c., 25 Am. & Eng. R. R. Cas. 507; Baltimore Elevator Co. v. Neal, 65 Md. 438; Wonder v. Baltimore, etc., R. Co., 32 Md. 411; Quincy Mining Co. v. Kitts, 42 Mich. 34; Foster v. Minnesota Cent. R. Co., 14 Minn. 360; Lindwall v. Woods (Minn. 1889) 42 N. W. Rep. 1020; Slattery v. Toledo, etc., R. Co., 23 Ind. 81; Gormley v. Ohio, etc., R. Co., 72 Ind. 31; Morgan v. Vale of Neath R. Co., 1 L. R. Q. B. 149.
6. Gillenwater v. Madison, etc., R. Co., 5 Ind. 339.

Contra. The following cases have expressly denied the doctrine:

Farwell cases, the principle becomes alike vicious and absurd by the very extent of its application. Every person in the service of the company is brought within its range. Even the position of the legal adviser of the railroad is included. He too, is, in some measure, the company's servant. He derives his compensation and authority from the same source as the engineer, conductor, and bridge builder. Like them, though in a fainter degree, he contributes to the ultimate objects of the company. Had he been on the train by the side of Gillenwater and injured by the same negligence, in a suit against the company he would have been summarily dismissed by the same argument. He would be told that his action was one of new impression, that he contracted with reference to the risks of the employment and reserved a compensation in fees with an eye to these risks. He would, therefore, be denied redress because he was a *quasi* co-servant of the careless engineer. It would be difficult to imagine upon what principles, either of justice or public policy, such ruling could be supported. For the basis of implied contract and increased compensation, with reference to such risks, on the part of the carpenter and legal adviser, is wholly visionary. But when it is held that the legal adviser, the carpenter, and all such *quasi* servants of the company are not co-servants within the meaning of the Farwell case, because their several duties belong to different departments, a result is attained, clear, just, and of easy application."

The Court seem to think that there is some warrant for the doctrine in the Farwell case,¹ saying: "It is thus clearly admitted that where the duties do in fact belong to different departments, a distinction should be made." The language of Judge Shaw warrants no such deduction, but is unmistakably opposed to it. He said: "It was strongly pressed in the argument that although this might

1. 4 Metc. (Mass.) 49.

be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus, to some extent, provide for his own security; yet that could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employes are the same, and the several persons employed derive their authority and compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a rope walk, several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together.

“ Besides, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer; but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the

negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow-servant, does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds: *Hence the separation of the employment into different departments cannot create that liability, when it does not arise from an express or implied contract, or from a responsibility created by law to third persons and strangers, for the negligence of a servant.*"

This doctrine was subsequently repudiated by the Indiana Court, and the general rule now prevails in that State.¹ It was adopted in Kentucky, however, in 1865, and was subsequently taken up in other States.²

§ 74. *Reasons for the Doctrine.*—

The different department limitation, or the doctrine of consociation, seems to be founded entirely upon the fact that servants in different departments of a large industrial enterprise are unable to exercise any influence upon one another in the encouragement of caution, and the supposed reasons for the rule as to fellow-servants failing, the courts refuse to apply it. Judge Dickey, of Illinois, in the case of *Chicago & N. W. R. Co. v. Moranda*,³ gives the following luminous and explicit exposition of the rule: "The line of argument, briefly stated, is this: The ancient common law rule which holds a master (even in cases where he is guilty of no fault) responsible for the neglect of his servant, where a third person suffers damage from the negligence of such servant, rests entirely upon considerations of its practical effect upon society,—upon consid-

1. *Slattery v. Toledo & W. R. Co.*,
23 Ind. 81; *Gormley v. Toledo, etc.*,
R. Co., 72 Ind. 31.

2. See *ante* § 72.

3. 93 Ill. 302.

erations of policy ; and these considerations of policy rest upon the idea that the subordination of the servant to the will of the master and his devotion to the interests of the master give him, under that rule, incentives to caution he would not otherwise have, and upon the idea that the rule will incite the master to greater vigilance in the selection of prudent servants, and to greater zeal in the exercise of his influence over his servant to secure the exercise of care in all cases. When the reason of the rule ceases, the application of the rule ought also to cease, and especially is this true of a rule which rests not upon its own justice, but solely upon considerations of policy. Where servants of the same master are directly co-operating with each other in a particular business at the time of the injury, or are, by their usual duties, brought into habitual consociation, it may well be supposed that they have the power of influencing each other to the exercise of constant caution in the master's work (by their example, advice, and encouragement, and by reporting delinquencies to the master) in as great, and in most cases in a greater, degree than the master. If, then, each such servant knows that neither he nor his fellow-servant, if injured by the others' negligence, can have redress against the master, he has such incentive to constant care, and such incentive to the exercise of his influence upon his fellow to incite him to constant care, that the well-being of society in such case does not demand that the master be made to answer. The same considerations of policy which, to avoid injuries to third persons, usually demand that the master be held responsible, seem plainly not to demand it in the case of such co-servants. But, though servants are employed by the same master, and are engaged in doing parts of some great work carried on by the master, still, unless either their duties are such that they usually bring about personal association between such servants, or unless they

are actually co-operating, at the time of the injury, in the business in hand, or in the same line of employment, they have generally no power to incite each other to caution by counsel, exhortation, or example, or by reporting delinquencies to the master, and the well-being of society in such case must depend upon the devotion of the servant to the interests of the master, and the zeal of the master to promote a constant exercise of due care by his servant; and to bring these instrumentalities into action it becomes necessary (as in the case of an injury to a stranger) to adhere to the general rule that the master must answer for the neglect of his servant, and this, as already suggested, because the facts are such that society cannot, in such case, avail itself of the mutual power and influence of one servant upon another for want of the necessary opportunity for its exercise, and hence must depend for inducements to caution which are supposed to follow the general rule of the master's liability."

§ 75. Application of the Rule.—

A common laborer employed loading and unloading cars, injured through the negligence of a railroad engineer;¹ a carpenter working on a railroad bridge, injured through the negligence of an engineer;² an engineer on one train injured through the negligence of an employe in charge of another train;³ a fireman killed by the explosion of a boiler through the carelessness of a boiler manufacturer;⁴ a teamster hauling ties in the construction of a railroad, injured through the negligence of an engine-driver of a train on which the workmen ride to dinner;⁵ an em-

1. *Louisville, etc., R. Co. v. Collins*, 2 Duv. (Ky.) 114; s. c., 87 Am. Dec. 486.

2. *Gillenwater v. Madison, etc., R. Co.*, 5 Ind. 339.

3. *Cooper v. Mullins*, 30 Ga. 146;

s. c., 76 Am. Dec. 638.

4. *Nashville, etc., R. Co. v. Jones*, 9 Heisk (Tenn.) 27.

5. *Hobson v. New Mexico & A. R. Co. (Ariz.)*, 28 Am. & Eng. R. R. Cas. 360.

ploye of a railroad company, injured while executing his duties as an "overhauler" of cars, through the negligence of an engineer of a shifting-engine employed by the same company;¹ a section hand, injured while standing at the side of the track to avoid a passing train, by being struck by a lump of coal cast by the fireman of the train from the tender;² a brakeman, injured by the bursting of a boiler owing to the negligence of the foreman at the round-house in sending out an unsafe engine;³ a fireman, injured by the negligence of a track-repairer in not keeping a bridge or culvert in proper repair;⁴ a sailor, injured by the negligence of other servants of the same master whose duty it was to see that the rigging and tackle of the vessel should not be sent out in bad order;⁵ a brakeman, injured through the negligence of other servants in placing an awning at the station in dangerous proximity to the operatives on passing trains;⁶ a fireman, injured through the negligence of other servants, not connected with the running of the train, in negligently placing a mail-catcher too near the track;⁷ a common laborer in the carpenter shop of a railroad company, injured by the negligence of the engineer in charge of a passing train;⁸ a station-agent and switchman at a way station, injured by the negligence of other servants of the company whose duty it was to see that cars should have proper lights and proper brakes;⁹ a switchman, injured through the negligence of car-inspectors in permitting a caboose to go out on the road with a

1. *Richmond, etc., R. Co. v. Norment* (Va.), 4 S. E. Rep. 211.

2. *Chicago, etc., R. Co. v. Moranda*, 93 Ill. 302; s. c., 108 Ill. 576; s. c., 17 Am. & Eng. R. R. Cas. 564.

3. *Chicago, etc., R. Co. v. Shannon*, 43 Ill. 338.

4. *Chicago, etc., R. Co. v. Swett*, 45 Ill. 197.

5. *Schooner Norway v. Jensen*, 52

Ill. 373.

6. *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183.

7. *Chicago, etc., R. Co. v. Gregory*, 58 Ill. 272.

8. *Ryan v. Chicago & N. W. R. Co.* 60 Ill. 171.

9. *Chicago, etc., R. Co. v. Taylor* 69 Ill. 461.

defective drawbar;¹ a track laborer, injured by the negligence of an engineer upon a passing locomotive;² an engineer injured by the negligence of a train dispatcher,³ have all been held entitled to recover of the common master for the injuries received, on the ground that the injured servant and the negligent servant were engaged in different departments and were not fellow-servants.

But it is held in Illinois that, though servants work under different overseers, if engaged in the same line of employment, such as necessarily brings them into frequent contact with each other in the prosecution of their work, they are fellow-servants.⁴

§ 76. Questions of Fact for the Jury.—

In Illinois it is held that the definition of negligence is a question of law, but it is a question of fact whether a particular case falls within that definition; and the same rule is applied to the question of who are fellow-servants of the same master. As to whether negligence in fact is shown, and whether the party injured or killed thereby was a fellow-servant, and received the injury from another servant of the same master in the same line of duty, bringing them often together, co-operating in the same work, the Supreme Court is precluded from determining.⁵ Thus in a suit against a railway company to recover for negligence resulting in the death of a section foreman having charge

1. Toledo, etc., R. Co. v. Fredericks, 71 Ill. 294.

2. Toledo, etc., R. Co. v. O'Connor, 77 Ill. 391. See also Chicago & A. R. Co. v. Kelley (Ill. 1889), 21 N. East Rep. 203.

3. Chicago, etc., R. Co. v. McLallen, 84 Ill. 109.

4. Chicago, etc., R. Co. v. O'Bryan, 15 Ill. App. 134.

5. Indianapolis, etc., R. Co. v. Morganstern, 106 Ill. 216; s. c., 12

Am. & Eng. R. R. Cas. 228; Chicago & N. W. R. Co. v. Moranda, 108 Ill. 576; s. c., 17 Am. & Eng. R. R. Cas. 564; Shedd v. Moran, 10 Ill. App. 618; Holton v. Daly, 4 Ill. App. 25; Chicago & A. R. Co. v. Kelly (Ill. 1889), 21 N. East Rep. 203. See also Devine v. Tarrytown, etc., Co., 22 Hun (N. Y.) 26; Hass v. Philadelphia etc., S. S. Co., 88 Pa. St. 269.

and oversight of repairs upon a certain part of the road, it has been held error to instruct the jury that such foreman is not engaged in the same line of duty with an engineer and fireman running with the defendant's locomotive engines, and therefore not within the rule which exempts the common employer from liability to one of its employes for damages, resulting from the fault, etc., of a fellow-servant, whether such persons were so co-operating and consociating is a question of fact for the jury and not of law.¹

§ 77. The Doctrine an Exceptional one.—

Judge Thompson, in his work on Negligence,² says that the doctrine as to different departments is an "exceptional" one. This is certainly so for it prevails in a very few States.³ An examination of the decisions which support it will disclose the fact that the courts have labored hard to soften the so-called rigor of the law in this respect at least. As has been said, the whole argument to support the limitation consists merely in the proposition that "the reason for the rule failing, the rule should fail also." But the reason for the rule which is said to fail in the case servants engaged in different departments, is not the only reason, nor indeed the fundamental one. "The exemption of the master," said Judge Shaw, in the Farwell case,⁴ "from liability for the negligence of a fellow-servant, does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds." The rule stands primarily upon the *implied contract* of the master with his servants, which does not extend to indemnify the servant against the negligence of any one but himself. That there are considerations of public policy entering into the rule does not make it rest the less upon the contractual relations of the em-

1. Chicago, etc., R. Co. v. Moranda, 108 Ill. 576; s. c., 17 Am. & Eng. R. R. Cas. 564.

2. 2 Thomp. Neg. 1026.

3. See *ante* § 72.

4. 4 Metc. (Mass.) 49.

ployer and the employe. If this, then, is to be taken as the true ground, the rule should not be confined to those servants whose duties bring them into such juxtaposition that one would be enabled to observe the negligence of his fellows. It is thus that the great majority of the courts of this country have construed it.¹ The Supreme Court of Rhode Island, in a recent case,² after quoting the language of Judge Shaw in the Farwell case, say: "The reasons here set forth are a strong answer to the position taken in the Illinois cases. *Railroad Co. v. Moranda*, 93 Ill. 302. They show an obvious impracticability in trying to gauge the liability of an employe, in a complex business, by the independence of its different branches, or by the intercommunication of those employed. Not only would it be almost impossible, in many cases, to separate the work into distinct departments, and to discern their dividing lines, but incidental duties, changing the relations of workmen to each other, would vary also the master's liability. He would thus be liable for the negligence of a servant at one time or place and not at another. Without a personal supervision of all his help in all their work, he could not know when he was responsible and when he was not. Moreover, such a rule would govern the liability of a master when the groundwork upon which the rule is founded did not exist. For, if the test of liability be that of the separate and independent duties of the servants, they may nevertheless be so near each other as to be able to exert a mutual influence to caution; or, if it be that of association, they may still be in the same department, but unable, from their duties or position, to exert such influ-

1. "If a hardship results from the application of the rule that an employer is not liable to one employe for an injury caused by another employe engaged in the same general undertaking, it is more fitting that the Legislature be invoked to give a remedy, than that this court should undertake to introduce doubtful exceptions to a rule so clearly established." *Gormley v. Ohio & M. R. Co.*, 72 Ind. 31.

2. *Brodeur v. Valley Falls Co. (R. I.)*, 17 Atl. Rep. 54.

ence. But, aside from these considerations, we do not think the rule is correct in principle. The principle upon which the determination of *Farwell v. Railroad Co.* proceeded is the same that has been generally followed in England and in this country, namely, that the rights and liabilities of both master and servant are those which grow out of their contract relation. The master impliedly agrees to use due care for the safety of his servant, in providing suitable places and appliances for work ; and, as is universally conceded, the servant agrees to assume the ordinary risks of his employment. The most common risks of service spring from the negligence of fellow-servants. When one works with others he knows that his safety depends on the exercise of care by those around him, as their safety depends also upon his own caution. No man can enter into an employment without a thought of this. Negligence, therefore, among workmen, is a breach of the duty which each owes to the others, and not a breach of the master's duty, if he has exercised the care that is required of him."

CHAPTER VI.

THE INCOMPETENCY OF FELLOW-SERVANTS.

§ 78. General Rule.

- 79. Injury must Result from Negligence or Unskillfulness of Incompetent Servant.
- 80. Degree of Care required in the Selection and Retention of Servants.
- 81. What does not Amount to Ordinary Care in Selection of Employes.
- 82. What Amounts to Due Care—Instances.
- 83. Employing Person Generally Known to be Incompetent.
- 84. Negligence in Retention of Servants.
- 85. Notice to Master of Employe's Incompetency.
- 86. Implied Notice—Servant Addicted to use of Intoxicants.
- 87. Reasonable Time for Action After Notice.
- 88. Employe Continuing in Service with Notice of Fellow-Servant's Incompetency.
- 89. Burden of Proof.
- 90. Evidence—General Reputation.
- 91. Same—Specific Acts of Negligence.
- 92. Same—Same.
- 93. Same—Book of Accidents.
- 94. Acts of General Agents.
- 95. Pleading.
- 96. Questions for Jury.

§ 78. General Rule.—

An employer who knowingly employs and retains an incompetent servant, is liable for injuries to a fellow-servant sustained through the incompetency of the servant so employed and retained, when it appears that the injured servant did not know, and had not the means of knowing,

of the incompetency of his fellow-servant. This proposition, it will be seen, is but the converse of the universally accepted rule, that where an employer uses due care and diligence in selecting and retaining only competent and trustworthy servants, he is not answerable to one of them for injuries resulting from the negligence of a fellow-servant in the same service. The rule is thus stated by Judge Thompson: "If the master has failed to exercise ordinary or reasonable care in the selection of his servants, in consequence of which he has in his employ a servant who, by reason of habitual drunkenness, negligence, or other vicious habits, or by reason of the want of requisite skill to discharge the duties which he is employed to perform, or for any other cause is unfit for the service in which he is engaged, and if, in consequence of such unfitness, an injury happens to another servant, the master must answer for the damages suffered by such servant."¹

1. 2 Thomp. Neg. 974, approved in *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261; s. c., 5 Am. & Eng. R. R. Cas. 554. To same effect see *Chicago & G. E. R. Co. v. Harney*, 28 Ind. 28; *Indiana Mfg. Co. v. Millican*, 87 Ind. 87; *Thayer v. St. Louis, A. & T. H. R. Co.*, 22 Ind. 26; *Ohio, etc., R. Co. v. Collarn*, 73 Ind. 261; *Evansville, etc., R. Co. v. Guyton*, 115 Ind. 450; s. c. 33 Am. & Eng. R. R. Cas. 311; *Texas M. R. Co. v. Whitmore*, 58 Tex. 276; s. c., 11 Am. & Eng. R. R. Cas. 195; *Blake v. Maine Cent. R. Co.*, 70 Me. 60; *Alabama, etc. R. Co. v. Waller*, 48 Ala. 459; *New Orleans, etc., R. Co. v. Hughes*, 49 Miss. 258; *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197; *Illinois Cent. R. Co. v. Jewell*, 46 Ill. 99; *Dow v. Kansas Pac. R. Co.*, 8 Kan. 642; *Union Pac. R. Co. v. Young*; 19 Kan. 488; *Kansas Pac. R. Co. v. Salmon*, 14 Kan. 512; *Colton v. Richards*, 123 Mass. 484; *Cayzer v. Taylor*, 10 Gray (Mass.), 274; *Farwell v. Boston & W. R. Co.*, 4 Metc. (Mass.) 49; *Curran v. Merchants' Manuf. Co.*, 130 Mass. 374; s. c., 39 Am. Rep. 457; *Rohback v. Pacific R. Co.*, 43 Mo. 187; *Harper v. Indianapolis & St. L. R. Co.*, 47 Mo. 567; *Moss v. Pacific R. Co.*, 49 Mo. 167; *McDermott v. Pacific R. Co.*, 30 Mo. 115; *McDermott v. Hannibal, etc., R. Co.*, 87 Mo. 285; s. c., 28 Am. & Eng. R. R. Cas. 528; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Hilts v. Chicago & G. T. R. Co.*, 55 Mich. 437; s. c., 17 Am. & Eng. R. R. Cas. 628; *Slater v. Chapman (Mich.)*, 35 N. W. Rep. 106; *Chesapeake, etc., R. Co. v. McMannon (Ky.)*, 33 Am. & Eng. R. R. Cas. 308; *Wabash, etc., R. Co. v. McDaniels*, 107 U. S. 454; s. c., 11 Am. & Eng. R. R. Cas. 158.

§ 79. Injury must Result from Negligence or Unskillfulness of Incompetent Servant.—

To enable a servant to recover of his master for injuries sustained through the instrumentality of a fellow-servant under the rule stated in the previous section, it is not sufficient to show that the fellow-servant was incompetent and that the master was guilty of negligence in employing him. It must also appear that the fellow-servant was guilty of some act of negligence or unskillfulness directly contributing to the injury.¹ The Supreme Court of Missouri² say upon this point: "The petition seems to have been framed upon the theory that if a servant is injured through the instrumentality of an unfit and incompetent fellow-servant, and the master has been guilty of negligence in employing such incompetent servant, he will be liable to the injured servant although the incompetent servant was, at the time of the injury, guilty of no negligence or unskillfulness. Such is not the law. The rule is, that where one servant is injured by the negligence or unskillfulness of a fellow-servant in the performance of his duties, and such servant was incompetent or unfit for the duties assigned him, the master will be liable if he was guilty of negligence in employing or retaining in his service such incompetent servant; but certainly the master cannot be held liable unless the incompetent servant was guilty of some negligence or misconduct directly contributing to produce the injury. It is not enough that one servant is injured while an incompetent servant, known by the master to be such, is engaged in the same common employment."

1. *Wright v. New York Cent. R. Co.*, 25 N. Y. 562; *Kersey v. Kansas City, etc., R. Co.*, 79 Mo. 362; s. c., 17 Am. & Eng. R. R. Cas. 638; *Murphy v. St. Louis, etc., R. Co.*, 71 Mo. 202; s. c. 2 Am. & Eng. R. R. Cas. 83; *O'Hare v. Chicago, etc., R. Co.* (Mo.), 9 S. W. Rep. 23.
 2. *Kersey v. Kansas City, etc., R. Co.*, 79 Mo. 362; s. c., 17 Am. & Eng. R. R. Cas., 638.

§ 80. Degree of Care Required in the Selection and Retention of Servants.—

It is well understood that a master does not warrant the competency of his servants, but he contracts to use all ordinary care and diligence in their selection and retention.¹ This ordinary care on the part of the master implies, as between him and his employes, not simply the degree of diligence which is customary among those engaged in a like enterprise or business, but such as, having respect to the exigencies of the particular service, ought reasonably to be observed. It is such care as, in view of the consequences that may result from negligence on the part of the employes, is fairly commensurate with the perils or dangers likely to be encountered. In *Wabash, etc., R. Co. v. McDaniels*² this question was fully discussed and the correct rule stated by the United States Supreme Court. Harlan, J., said: "The discussion in the adjudged cases discloses no serious conflicts in the courts as to the general rule, but only as to the words to be used in defining the precise nature and degree of care to be observed by

1. *Union Pac. R. Co. v. Millikin*, 8 Kan. 647; *Columbus, C. & I. C. R. Co. v. Troesch*, 68 Ill. 545; *Illinois, etc., R. Co. v. Cox*, 21 Ill. 20; *Blake v. Maine Cent. R. Co.*, 70 Me. 60; *Beaulieu v. Portland Co.*, 48 Me. 291; *Hilts v. Chicago & G. T. R. Co.*, 55 Mich. 437; s. c., 17 Am. & Eng. R. R. Cas. 628; *Davis v. Detroit, etc., R. Co.*, 20 Mich. 105; *Michigan, etc., R. Co. v. Leahy*, 10 Mich. 193; *Sizer v. Syracuse, B. & N. Y. R. Co.*, 7 Lans. (N. Y.) 67; *Wright v. New York, etc., R. Co.*, 25 N. Y. 562; *Chapman v. Erie R. Co.*, 55 N. Y. 579; *Banlec v. N. Y. & H. R. Co.*, 59 N. Y. 356; *Tarrant v. Webb*, 18 C. B. 797; *Alabama & F. R. Co. v. Waller*, 48 Ala. 459; *Rohback v. Pacific R. Co.*, 43 Mo. 187; *Harper v. Indianapolis, etc., R. Co.*, 47 Mo. 567; *McDermott v. Pacific R. Co.*, 30 Mo. 115; *Fox v. Sanford*, 4 Sneed (Tenn.) 36; *Sullivan v. Mississippi, etc., R. Co.*, 11 Iowa, 421; *Donaldson v. Mississippi, etc., R. Co.*, 18 Iowa, 281; *Hunt v. Chicago, etc., R. Co.*, 26 Iowa, 363; *Farwell v. Boston, etc., R. Co.*, 4 Metc. (Mass.) 49; *Columbus, etc., R. Co. v. Webb*, 12 Ohio St. 475; *Cooper v. Mullins*, 30 Ga. 146; *Ponton v. Wilmington, etc., R. Co.*, 6 Jones (N. Car.), 245; *Noyes v. Smith*, 28 Vt. 59; *Hard v. Vermont, etc., R. Co.*, 32 Vt. 473; *Pilkenton v. Gulf, etc., R. Co. (Tex.)* 7 S. W. Rep. 805.

2. 107 U. S. 454; s. c., 11 Am. & Eng. R. R. Cas. 158.

the employer. The decisions, with few exceptions not important to be mentioned, are to the effect that the corporation must exercise ordinary care. But, according to the best considered adjudications, and upon the clearest grounds of necessity and good faith, ordinary care in the selection of servants and agents implies that degree of diligence and precaution which the exigencies of the particular service reasonably require. It is such care as, in view of the consequences that may result from negligence on the part of the employer, is fairly commensurate with the perils or danger likely to be encountered.

* * * These observations meet in part the suggestion made by counsel, that ordinary care in the employment and retention of railroad employes means only that degree of diligence which is customary or is sanctioned by the general practice and usage which obtain among those intrusted with the management and control of railroad property and railroad employes. To this view we cannot give our assent. There are general expressions in adjudged cases which apparently sustain the position taken by counsel; but the reasoning upon which those cases are based is not satisfactory, nor, as we think, consistent with that good faith which at all times should characterize the intercourse between officers of railroad corporations and their employes. It should not be presumed that the employe sought or accepted service upon the implied understanding that they would exercise less care than that which prudent and humane managers of railroads ought to observe. To charge a brakeman, when entering the service of a railroad company, with knowledge of the degree of care generally or usually observed by agents of railroad corporations in the selection and retention of telegraphic operators along the line traversed by trains of cars,—a branch of the company's service of which he can have little knowledge, and with the employe specially engaged therein he can ordina-

rily have little intercourse,—is unwarranted by common experience. And to say, as matter of law, that a railroad corporation discharged its obligation to an employe—in respect of the fitness of co-employes, whose negligence has caused him to be injured—by exercising, not that degree of care which ought to have been exercised, but only such as like corporations are accustomed to observe, would go far toward relieving them of all responsibility whatever for negligence in the selection and retention of incompetent servants. If the general practice of such corporations, in the appointment of servants, is evidence which a jury may consider in determining whether in the particular case the requisite degree of care was observed, such practice cannot be taken as conclusive, upon the inquiry as to the care which ought to have been exercised. A degree of care ordinarily exercised in such matters may not be due, or reasonable, or proper care, and, therefore, not ordinary care, within the meaning of the law.”¹

In *Jordan v. Wells*², the United States Circuit Court for the Northern District of Georgia held that in order to entitle one servant to recover for an injury received through the negligence of a fellow-servant, it must be shown, not only was the servant incompetent but also that the master was *willfully* negligent in employing him. But this is not the law.³

§ 81. What does not Amount to Ordinary Care in the Selection of Employes.—

A railroad company placing one of its brakemen in a position where peculiar fitness is required, without being

1. See also *Hilts v. Chicago & G. T. R. Co.*, 55 Mich. 437; s. c., 17 Am. Eng. R. R. Cas. 628. 60; *Tyson v. South & N. Ala. R. Co.*, 61 Ala. 554; *Delaware, etc., Canal Co. v. Carroll*, 89 Pa. St. 374; *McDonald v. Hazletine*, 53 Cal. 35, and

2. 3 Woods (U. S.) 527.

3. Wood's M. & S. (2d Ed.) 819; authorities cited *supra*.
Blake v. Maine Cent. R. Co., 70 Me.

assured of his competency by instituting special inquiries, or from previous like service, is liable for any injuries which may happen to a fellow-servant, without notice, the proximate cause of which was the incompetency of such brakeman. Thus, a conductor, having been but recently promoted from the position of brakeman, but without test as to his qualifications by any special examination, who is placed in charge of a "wild train," a service demanding special skill, and who causes a collision owing to his neglect of an order, in which a brakeman on the train was injured, is incompetent for the position in which he was placed, and the company is remiss in its duty in selecting him, and is liable to the brakeman for the injuries he received.¹ And where the conductor of a train was injured

1. *Evansville & T. H. R. Co. v. Guyton*, 115 Ind. 450; s. c., 33 Am. & Eng. R. R. Cas. 311. M., plaintiff's intestate, who was an engineer in defendant's employ, was killed by the collision of the train he was running with freight cars standing on the track of defendant's road at O. The accident occurred on a dark and foggy night. A freight train was being made up at O., and the main track and switch were both occupied. The usual signal to stop a train was the swinging of a red lantern. In addition, the rules of the company requires its flagman on foggy nights to use torpedoes, which were provided for that purpose. There were three brakemen upon the freight train, two of them regular brakemen, and one, T., an extra man; it was defendant's custom to keep extra men at O. to supply the place of regular brakemen, sick or absent. T., about a week before the accident, applied to defendant's general train dispatcher for a position as brakeman, and was advised that

he might get a job at O., to which place he went and reported to the yardmaster, and he had, prior to the accident, made two or three trips as brakeman. He was selected by the conductor of the freight train to take the place of a regular brakeman. The yardmaster requested the conductor to send out a flagman to flag the expected train. One of the regular brakemen started to do this, but the conductor ordered him to remain and sent T. The latter did not take or use a torpedo, and had not been informed of, and did not know of, the rule requiring such use. He had never flagged a train in the night, except the second night before, on which occasion the conductor found fault with and discharged him for not obeying orders. T. failed to properly signal the approaching train, and this omission occasioned the accident. *Held*, that the evidence justified the submission to the jury of the question as to the negligent performance, by defendant, of the duty it owed to its

in consequence of the mismanagement of a locomotive by a fireman, who had been placed in charge of the engine by the agents of the company, it was held, in an action for damages against the company, that it was responsible, on the ground that its agents were negligent or unmindful of their duty in employing competent and skillful servants in the execution of the company's business.¹ In an Illinois case² it appeared that the defendant, a railroad company, employed an engineer, who was given to fast running, addicted to drinking, and inattentive to his watch and time-card. It was held that the defendant was bound to know the qualifications of its employes in such responsible positions, and that where a brakeman was thrown from a car and killed by reason of the engineer's incompetency, his representatives could recover for his death. Doubtless this case states the rule of responsibility too strictly.³ Where a railroad company, whose road formed a junction with another road, intrusted a person employed and paid by such other road with the business of attending to trains at such junction, and such person was incompetent, whereby death resulted to one of its engineers, it was held liable to his representatives in damages.⁴ In a case decided by the United States Supreme Court a brakeman sought damages for an injury alleged to have resulted from the employment by the company of an incompetent train dispatcher. It appears that the latter was a bright, industrious boy seventeen years of age, but that his whole knowledge of telegraphy had been acquired during one year's service as a messenger boy, during which he received instruction in the art; and that he had not

servants, to use due care in the se- 352.

selection of competent co-servants.
Mann v. Delaware & H. Canal Co.,
 91 N. Y. 495; s. c., 12 Am. & Eng.
 R. R. Cas. 199.

2. *Illinois Cent. R. Co. v. Jewell*,
 46 Ill. 99.

3. See cases cited *ante* § 80.

4. *Taylor v. Western Pacific R.*
Co., 45 Cal. 323.
 1. *Harper v. Indianapolis & St. L.*
R. Co., 47 Mo. 567; s. c., 4 Am. Rep.

been considered competent for some parts of the business. A judgment for damages was sustained.¹ A manufacturing company also, is liable for damages caused by placing a man, accustomed to the habitual use to excess of intoxicating liquors, in charge of business including the control and direction of persons operating dangerous machinery.²

§ 82. What Amounts to due Care.—Instances.—

In an action against a railroad company by an engineer, for an injury caused by the negligence of a freight conductor, evidence that he was put on the list of conductors some eight months before the accident, after having been employed as brakeman for a somewhat longer period, and that he had once by mistake carried a passenger by his stopping-place, and had for that reason spoken disparagingly of himself to his employer, but where it appears that he had nevertheless maintained a good standing, and that no fault had been found with him except by himself for this single blunder, does not make out a case of incompetence.³ And in a Texas case⁴ the personal representatives of a brakeman sought damages on the ground that his death had been caused by the incompetence of the engineer. The latter had been a fireman on other roads, and also on the defendant's road for a year previous to his promotion as engineer, and had borne a good reputation as to his knowledge of his work and the performance of his duty. It was held that the defendant was not guilty of negligence in employing him in the latter capacity.

Promoting to the post of conductor a person who has served seven years as car coupler and shover, the duties of which place made him acquainted with the modes of mak-

1. *Wabash R. Co. v. McDaniels*, 107 U. S. 454; s. c., Am. & Eng. R. R. Cas. 158.

2. *Kean v. Detroit, etc., R. M. Co.* (Mich.), 33 N. W. Rep. 395.

3. *Michigan Cent. R. Co. v. Dolan*, 32 Mich. 510.

4. *Texas & N. O. R. Co. v. Berry*,

67 Tex. 238.

ing up trains, the dangers incurred by those employed in the work and by others, and the precautions necessary to guard against accidents, is not negligence nor evidence of negligence; it not appearing that such person had ever shown himself incompetent or unfaithful prior to the happening of the injury sued for.¹

*Gibson v. North. Cent. R. Co.*² was an action against a railroad company by an employe for an injury resulting from a defective car-bumper. It was alleged that the car inspector was negligent in not having sent the car to the shops for repairs. It appeared that the inspector was sober and intelligent, but that he had no knowledge of machinery except that obtained by working one or two years in the defendant's carpenter shop, bolting, putting in brasses and boxes, and assisting in the shop. The Court held that the defendant was not negligent in appointing him a car-inspector. In a Pennsylvania case³ it appeared that B., an engineer in the employ of a railroad company, was going through the yards of the company to his work; a locomotive of the company was backing slowly on one of the tracks; it struck B. and killed him. Whether he was walking on the track, or stepped suddenly upon it and in the way of the approaching engine, was not clearly shown. In an action against the company for damages, based on the negligence of the company, alleged to consist in placing the engine in charge of an engineer whose left eye was so badly diseased as to require the keeping of it bandaged, and whose right eye was defective in vision owing to sympathetic causes, the Supreme Court held that the plaintiff was properly nonsuited.

§ 83. Employing a Person Generally Known to be Incompetent.—

In such case it has been held that the master is charge-

1. *Hasken v. New York Cent. & H. R. Co.*, 65 Barb. (N. Y.) 129.
2. 22 Hun (N. Y.) 289.
3. *Keys v. Pennsylvania R. Co.* (Pa.), 3 East. Rep. 830.

able with negligence in not knowing what the reputation of such person is.¹ Thus, in a Massachusetts case,² it appeared that the plaintiff, a carpenter, was employed by the defendant railroad company as a car repairer. By the terms of his contract he was transported to and from the place of work on the defendant's trains. On one occasion, while so riding on the train, through the negligence of a switch-tender, while making what is called a "flying switch," he was severely injured. In order to establish negligence on the part of the master, the plaintiff offered to show that the switchman had been in the employ of the defendant two years, and was grossly intemperate and an habitual drunkard, and that when first employed by the defendant he had the reputation of so being in East Boston, where he lived, and was drunk every night while in their employment, and was drunk when the accident occurred; also that he (the plaintiff) had no knowledge of the switchman's habits. The plaintiff lived in North Chelsea, and the switchman four miles away, at East Boston, where he was employed. The Court below held that upon these facts, if proved, no recovery could be had, but upon appeal the ruling was reversed. Gray, J., said: "The evidence offered by the plaintiff at the trial was competent to show that the defendants knowingly, or in ignorance caused by their own negligence, employed an habitual drunkard as a switchman, and thereby occasioned the accident. Of the sufficiency of this evidence a jury must judge. If the plaintiff can satisfy them that such misconduct or negligence in the defendants caused the injury, and that he himself used due care he may maintain the action."

§ 84. Negligence in the Retention of Servants.—Instances.—

Although an employer may have used due care and dili-

1. *Davis v. Detroit, etc., R. Co. Master & Seryant* (2d ed.) § 421.
20 Mich. 105; *Gilman v. Eastern R. Co.* 2. *Gilman v. Eastern R. Co.*, 10
Co., 10 Allen (Mass.) 233; *Wood on Allen* (Mass.) 233.

gence in selecting his servants, if subsequently he obtains knowledge of a servant's incompetency or unfitness for his position, and retains him in his employment, he is liable to a fellow-servant for any injury resulting from such unfitness.¹ Thus, where a conductor of a train was injured by reason of the incompetency of a fireman whom the engineer permitted to manage the engine, it was held that if the company knew of such a practice on the part of the engineers on its road, and did not forbid it, and the conductor did not know that the engine was in charge of the fireman at the time, the company was liable for damages for the injury sustained.² And in an Indiana case³ the plaintiff was a track repairer, and had been injured by an engine run by a fireman. It was held that the defendant was liable, although it had given orders to its engineers not to permit firemen to control its engines, because, having had notice of disobedience of such orders, it retained the disobedient engineers in its employ.

A New York case⁴ was an action by an employee, whose

1. *Harper v. Indianapolis & St. L. R. Co.*, 47 Mo. 567; *Pittsburg, Ft. Wayne & C. R. Co. v. Ruby*, 38 Ind. 294; *Gilman v. Eastern R. Co.*, 13 Allen (Mass.) 433; s. c., 10 Allen (Mass.) 233; *Northern Pacific R. Co. v. Mares*, 123 U. S. 710; *Ohio & Miss. R. Co. v. Collarn*, 73 Ind. 261; s. c., 5 Am. & Eng. R. R. Cas. 554; *Texas-Mexican R. Co. v. Whitmore*, 58 Tex. 276; s. c., 11 Am. & Eng. R. R. Cas. 195; *Mobile & Montgomery R. Co. v. Smith*, 59 Ala. 245; *Pennsylvania Co. v. Roney*, 89 Ind. 453; *Little Rock & Ft. S. R. Co. v. Duffy*, 35 Ark. 602; s. c., 4 Am. & Eng. R. R. Cas. 637; *Houston & T. C. R. Co. v. Myers*, 55 Tex. 110; *McDermott v. Hannibal & St. Jo. R. Co.*, 73 Mo. 516; s. c., 2 Am. & Eng. R. R. Cas. 85; *Baulec v. New York & A. R. Co.*, 59 N. Y. 356; *Huntingdon & Broad Top R. Co. v. Decker*, 82 Pa. St. 119; s. c., 84 Pa. St. 419; *Union Pacific R. Co. v. Young*, 19 Kan. 488; *Cleghorn v. New York Central, etc., R. Co.*, 56 N. Y. 44; *Beems v. Chicago, R. I. & P. R. Co.*, 58 Iowa, 150; s. c., 10 Am. & Eng. R. R. Cas. 658; *Atchison, T. & S. F. R. Co. v. Moore*, 29 Kan. 632; s. c., 11 Am. & Eng. R. R. Cas. 243; *Lanning v. New York Cent. R. Co.*, 49 N. Y. 521.
2. *Harper v. Indianapolis, etc., R. Co.*, 47 Mo. 567.
3. *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261; s. c., 5 Am. & Eng. R. R. Cas. 554.
4. *Sizer v. Syracuse, B. & N. Y. R. Co.*, 7 Lans. (N. Y.) 67. In *United States Rolling-stock Co. v. Wilder*,

business it was to make up freight trains, for an injury occasioned by the incompetency of an engineer. The Court said: "The company owe it to those engaged in coupling and uncoupling cars, to exercise the highest care in the selection of engineers to manage engines used in making up trains. Men of strictly temperate habits, men who are careful, cool, discreet, and obedient only should be employed; and if men wanting these qualities are knowingly employed, and injury results therefrom, the company is as liable to the employe injured as if the engineer were unskillful." It appeared that the engineer in this case was habitually disobedient to orders, and was not a regular engineer, of which facts the superintendent had knowledge, and the company was held liable for damages. And in an

116 Ill. 100; s. c., 25 Am. & Eng. R. R. Cas. 414, the plaintiff sued for the loss of a hand, resulting from the alleged negligence of a fellow-servant. The Court said: "The defendant, it will be perceived, is charged with negligence in the selection and hiring of an incompetent engineer, and also in suffering and submitting such incompetent engineer to manage, control, and operate its cars and engine. * * * Whatever may be said in respect to the first branch of the subject, the decided weight of evidence shows that Guernsey, the defendant's engineer, was incompetent, and that the defendant had, at the time of, and during plaintiff's employment, notice of this fact. Guernsey was first employed by the defendant in the capacity of truck repairer, and was promoted from that position to the more responsible one of engineer, upon his own recommendation. He entered the defendant's service in May or June, 1880, and the attention of the company was frequently called to his in-

competency. It is true, Cary, foreman, and Stagg, superintendent of the company, thought him competent for the position he occupied. As they were probably responsible to the company, both for his employment and retention, it is not a matter of surprise that they should so consider him. So far as Cary is concerned, he might safely say this, for he evidently thought his position required little or no skill; for, in answer to the inquiry if it did not require as much skill to run the company's engine as any other, he says: 'No, sir; I will say that it does not require any but an ordinary man. A very ordinary man can do it in our yard. * * * A man that is competent to keep the water up and his pumps going can do our work.' Without dwelling upon the facts, we will add, in general terms, that the witnesses for the plaintiff make out a strong case of inexcusable negligence against the defendant in retaining Guernsey as engineer of the company."

action by a brakeman against a railway company, for injuries alleged to have been caused by negligence of defendant's engineer, there was evidence that the engineer was careless in handling his engine, in making couplings, and in running the train, and that he had been reported to the conductor for this; also that his engines habitually came into the shop out of repair, with defects that would not have occurred had he exercised proper care. The Supreme Court of Texas held that there was sufficient evidence to support findings of the jury that the engineer was negligent, and that the company had notice of that fact, although there was testimony on the part of the defendant that he was a safe and careful engineer.¹ And it is no excuse to the company, whose negligence in retaining an incompetent servant occasioned a collision, that the party injured, in the excitement of the moment, lost his presence of mind and adopted the wrong mode of self-preservation.²

Where, however, in an action for personal injuries alleged to have been caused by the negligence of the employer in retaining the services of a fellow-servant who was careless, and whose carelessness caused the injury, a witness testified that he considered the fellow-servant slow and lazy, and not fit for the service, he was so slow, and witness had so informed the agent of the employer; and in answer to a question, if the fellow-servant was competent and careful in the performance of his duties, witness testified, "Yes, he was always careful about his work," it was held that this evidence was not sufficient to establish the

1. *Houston, etc., R. Co. v. Patton* (Tex.), 9 S. W. Rep. 175. Where an employe was injured through the negligence of an engineer, evidence that the latter had frequently shown his recklessness and unfitness, and, notwithstanding complaints against him, was retained by the master, makes a case for the plaintiff. *Northern Pac. R. Co. v. Mares*, 123 U. S. 710.

2. *Chicago & N. W. R. Co. v. Moranda*, 108 Ill. 576; s. c., 17 Am. & Eng. R. R. Cas. 564.

negligence of the employer.¹ And the general rule of the non-liability of the master for injuries caused by a fellow-servant is not changed by reason of the co-employee being sick or worn out with continuous service, if the negligence which caused the injury did not arise from his sickness or worn-out condition.²

§ 85. Notice to Master of Employee's Incompetency.—

It is well established that to render a master liable for retaining in his service an incompetent employee, he must have notice of the unfitness of the servant.³ As to what amounts to notice of incompetency the authorities are somewhat conflicting. It is agreed, however, that good and proper qualifications once possessed may be presumed to continue, and the master may rely on that presumption until notice of a change.⁴ And mere proof of specific acts of carelessness on the part of a servant, without evidence of actual or reasonably chargeable knowledge thereof, on the part of the master, is insufficient to warrant a jury in inferring negligence

1. *Corson v. Maine Cent. R. Co.*, 76 Me. 244; s. c., 17 Am. & Eng. R. R. Cas. 634. In an action against a railroad for the death of a fireman in a collision caused by a misplaced switch, it appeared that the brakeman had properly placed the switch, and one train had passed safely by shortly before the collision. Evidence for plaintiff tended to show that this brakeman had proved careless and incompetent on other occasions, but not on the occasion of the collision. Plaintiff did not prove carelessness on the part of any one else, nor that the switch could have been misplaced by the train which passed. *Held*, that the Court should have charged the jury to find for defendant. *Galveston, etc., R. Co. v. Faber (Tex.)*, 8 S. W. Rep. 64.

2. *Johnson v. Pittsburg & W. R. Co.* 114 Pa. St. 443.

3. *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484; *O'Hare v. Chicago, etc., R. Co. (Mo. 1888)*, 9 S. W. Rep. 23.

But in *Poirier v. Carroll*, 35 La. Ann. 699, it was held that in an action by A., a servant hired only for a limited time, to recover of B., his employer, for injuries caused by the incompetence of C., a fellow-servant, A. need not prove that B. had notice of C.'s incompetence and had promised to remove him. *Compare*, also, *McDermott v. Hannibal, etc., R. Co.*, 87 Mo. 285; s. c., 28 Am. & Eng. R. R. Cas. 528.

4. *Chapman v. Erie R. Co.*, 55 N. Y. 579; *Blake v. Maine Cent. R. Co.*, 70 Me. 60.

on the part of the master in retaining such servant in his employ.¹

§ 86. Implied Notice.—Servant Addicted to use of Intoxicants.—

Although the master has had no actual notice of the incompetence of the servant, if it was notorious and of such a character that with proper care he would have known of it, he will be liable for an injury to another servant resulting from such incompetence.² “While it is true,” say the Supreme Court of Michigan,³ “that when a company has exercised due care and prudence in the choice of its servants, and that where this has been done no presumption of unfitness afterwards arises, yet the master cannot shut his eyes, close his ears, and rest in peaceful security, unconscious and indifferent to what may thereafter take place. A vigilance corresponding in degree to the dangers attending, or likely to, careless management, ever remains on the part of the master, and when the plaintiff has shown repeated in-

1. *Huffman v. Chicago, etc., R. Co.*, 78 Mo. 50; s. c., 17 Am. & Eng. R. R. Cas. 625.

The declaration of a road-master, who had authority to employ and discharge a section foreman, that the latter was not “a good railroad man,” is not admissible to prove the fact that the section foreman was incompetent, but is admissible to prove that the company had notice of his incompetency if such incompetency was established by other evidence, or there was other evidence tending to establish it, and such declaration being admitted, its effect should have been so controlled by an instruction. *McDermott v. Hannibal, etc., R. Co.*, 87 Mo. 285; s. c., 28 Am. & Eng. R. R. Cas. 528.

2. *Chicago, etc., R. Co. v. Doyle*, 18 Kan. 58; *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176; s. c., 2 Am. &

Eng. R. R. Cas. 230; *Gilman v. Eastern R. Co.*, 10 Allen (Mass.) 233; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521. And see cases cited *infra*.

3. *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176; s. c., 2 Am. & Eng. R. R. Cas. 230. In *Chicago, etc., R. Co. v. Doyle*, 18 Kan. 68, it was held that in an action by an employe against his employer for injuries caused by the negligence of a fellow-servant, an allegation that the employer knew of the latter's unfitness and recklessness, is sustained by proof showing that such incompetency ought to have been known by the defendant. Where the employe is so grossly and notoriously unfit that not to know of his unfitness is negligence, the law presumes notice to the employer.

stances of carelessness or incompetency of a certain character on the part of the servant, it remains for the jury to determine whether they did come to the knowledge of the master, or would have, had ordinary care been exercised on his part. Any other rule would absolve the master from all danger, if he but exercised due caution in the first place, unless actual knowledge was afterwards brought home to him, which in many cases it would be most difficult to prove."

This rule has been frequently applied where the incompetent servant has been addicted to excessive use of intoxicants.¹ Thus, habitual drunkenness of a railroad conductor, under circumstances bringing knowledge thereof to his employers, is sufficient to render them liable for injury resulting therefrom.² And where a switchman was an habitual drunkard, and this fact was known or ought to have been known, to the railroad company, and an injury resulted from his failure to properly adjust a switch, caused by his intoxication, it has been held that the company was liable.³ No definite rule can be laid down as to what length of time must elapse, where actual notice is not shown, to charge a railroad company with negligence in failing or neglecting to ascertain the habits of its employes with reference to drinking intoxicating liquors to excess. If they exercise due care and diligence in seeing that their employes are competent, careful and sober, and fail to discover any vicious habits, they cannot be held liable for

1. *Gilman v. Eastern R. Co.*, 10 176; s. c., 2 Am. & Eng. R. R. Cas. Allen (Mass.), 233; s. c., 13 Allen 230; *Kean v. Detroit, etc.*, Rolling (Mass.), 433; *Laning v. New York Mills (Mich.)*, 33 N. W. Rep. 395. Cent. R. Co., 49 N. Y. 521; *Hilts v. Contra, Chapman v. Erie R. Co.*, 55 Chicago & G. T. R. Co., 55 Mich. N. Y. 579.
 437; s. c., 17 Am. & Eng. R. R. Cas. 2. *Chicago & A. R. Co. v. Sullivan*, 63 Ill. 293.
 628; *Chicago & A. R. Co. v. Sullivan*, 63 Ill. 293; *Chicago, R. I. & P. R. Co. v. Doyle*, 18 Kan. 58; *Michigan Cent. R. Co. v. Gilbert*, 46 Mich.

3. *Gilman v. Eastern R. Co.*,¹ 10 Allen (Mass.) 233.

negligently retaining incompetent men. Thus, where it is shown that an accident occurred through the negligent act of an engineer who was in an intoxicated condition, and that he had been in the habit of drinking to excess for a period of nine months while in the employment of the railroad company, and no actual notice or knowledge ever reached any superior officer of the engineer, a jury will be justified in finding that the company was negligent in failing to learn such habits, and in retaining the engineer in their employment.¹ In a recent Michigan case² it appeared that a foreman, under whose directions the plaintiff claimed to have been injured, was in the habit of getting intoxicated, and that the master knew of such habit. The Court said: "There can be no question, I apprehend, at this late day, but that it must be regarded as negligence and a want of ordinary care in any of our large manufacturing institutions to place men, who are accustomed to the habitual use to excess of intoxicating liquor, in charge of business requiring the control and direction of persons operating dangerous machinery, and that for any injury arising to the employed under the charge of an intoxicated foreman, arising from such cause, when the company has knowledge of such intemperate habits, it must and should make reasonable compensation." The case seems to have gone against the plaintiff because the danger was as apparent to him as to the foreman, and it was said that he should not have obeyed the order in question.

Where the officers of a railroad company have had their attention directed to the intemperate habits of an employe, it is their duty to make careful and frequent investigation as to the fact if they retain him in their service.³

1. *Hilts v. Chicago & G. T. R.* W. Rep. 395.

Cq., 55 Mich. 437; s. c., 17 Am. & Eng. R. R. Cas. 628.

3. *Mich. Cent. R. Co. v. Gilbert*, 46 Mich. 176; s. c., 2 Am. & Eng. R.

2. *Kean v. Detroit Copper and Brass Rolling Mills* (Mich.), 33 N. R. Cas. 230.

§ 87. *Reasonable Time for Action After Notice.*—

An employer is not liable to an employe who is injured by the negligence of a co-employe; of whose negligent character it had been notified, provided the accident which occasioned the injury occurred before the expiration of a reasonable time for the employer to take proper action in the premises after such notice had been given. Four weeks has been held not to be an unreasonable time under certain circumstances.¹

Where a servant has knowledge of the incompetence of a fellow-servant, and, continuing in the master's employment, is injured by reason of such incompetence, the fact that he had made complaint, and was told that the incompetent servant would be changed, is to be considered in arriving at a conclusion as to whether the injured servant was guilty of contributory negligence.² Thus, where plaintiff, a blacksmith in employ of defendant, was assigned an incompetent helper, and the latter was changed on plaintiff's complaint, but reassigned May 4th, and plaintiff again complained on the 6th, and was promised another helper, and was injured on the 10th, a verdict of the jury holding plaintiff free from negligence will be sustained.³ And where the employer and employe have equal knowledge of the unfitness of the incompetent employe, and the latter continues in the service, each party takes the risk, unless the employer undertakes to give special directions.⁴ It is a question of fact for the jury whether, under the circumstances, the fact of a servant's remaining in the master's employ with knowledge of the incompetency of a fellow-servant, was contributory negligence on his part.⁵

1. *Ross v. Chicago, etc., R. Co.*, 8 20 Mich. 105; *Hasken v. New York, Fed. Rep.* 544. etc., R. Co.; 65 Barb. (N. Y.) 129.

2. *Laning v. New York Cent. R. Co.*, 49 N. Y. 521. 5. *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Kansas Pac. R. Co. v. Peavey*, 34 Kan. 474. And cases cited *supra*.

3. *Lyberg v. Northern Pac. R. Co.* (Minn.), 38 N. W. Rep. 632.

4. *Davis v. Detroit, etc., R. Co.*,

§ 88. Employe Continuing in Service with Notice of Fellow-Servant's Incompetency.—

Where the servant has full and equal knowledge with the master that a fellow-servant is incompetent, and he remains in the service, making no complaint, this may constitute contributory negligence.¹ But a servant is warranted in assuming that the master has used reasonable care and prudence in the selection of those already employed in the same branch of service; and until notice to the contrary is brought home to the employe, he may safely act upon that hypothesis. "All that the law demands of one thus employed (a fellow-servant) is, that he keep his eyes open to what is passing before him, and avail himself of such information as he may receive with respect to the habits and characteristics of his fellow-servants; and if from either of these sources of information he finds one of them, from incompetency or other cause, renders his own position extra hazardous, it is his duty to notify the master, and if the latter refuses to discharge the incompetent or otherwise unfit fellow-servant, the complaining servant will have no other alternative but to quit the master's employ. If he does not, he will be deemed to have assumed the extra hazard of his position thus occasioned."²

1. *Hatt v. Nay*, 144 Mass. 186; *Indiana, etc., R. Co. v. Dailey*, 110 Ind. 75; *Wright v. New York Cent. R. Co.*, 28 Barb. (N. Y.) 80; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Lake Shore, etc., R. Co. v. Knittal*, 33 Ohio St. 468; *Kansas Pac. R. Co. v. Peavey*, 34 Kan. 474; *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104; *Texas M. R. Co. v. Whitmore*, 58 Tex. 276; s. c., 11 Am. & Eng. R. R. Cas. 195; *Davis v. Detroit, etc., R. Co.*, 20 Mich. 105; *Kroy v. Chicago, etc., R. Co.*, 32 Iowa, 357; *McDermott v. Hannibal, etc., R. Co.*, 87 Mo. 285; s. c., 28 Am.

& Eng. R. R. Cas. 528.

If a servant knows that his foreman is careless, and fails to notify his master thereof, but continues in the service, he cannot recover for an injury resulting from such carelessness. *Hatt v. Nay*, 144 Mass. 186.

2. *United States Rolling Stock Co. v. Wilder*, 116 Ill. 100; s. c., 25 Am. & Eng. R. R. Cas. 414.

Under the statutory rules governing English collieries, the rope by which pitmen descend should be tested every day. The requirement was habitually disregarded, to the knowledge of a mine owner, by those

If, however, the master has promised a servant that an incompetent and unsafe co-employee shall be removed, the servant so promised may remain for a time in the service without being conclusively charged, as a matter of law, with contributory negligence, even though, without such promise, he would have been so chargeable.¹

§ 89. Burden of Proof.—

The law presumes that the master exercises care in the employment of his servants, and the burden is upon him who alleges negligence in this particular to prove it.² In-

whose duty it was to test the rope. A pitman, who knew of the rule and its habitual violation, refused, though advised by the banksmen, to examine the rope (which had been injured the night before, and not since tested) before descending by it into the pit. The rope broke, and the pitman was killed. It was considered by the Court that, had the pitman been guilty of no negligence, his representative might have recovered damages for his death; but that, having been guilty of contributory negligence, they could not. *Senior v. Ward*, 1 El. & El. 385; s. c., 5 Jur. (N. S.) 172; 28 L. J. Q. B. 137; 7 Week. Rep. 261.

According to some cases, it would seem that, if the injured servant had the same means of knowing the incompetence of his fellow-servant as the master possessed, he cannot recover for an injury resulting from such incompetence. Especially would this rule obtain in cases where the injured servant held an intermediate position between the employer and the incompetent servant. *Davis v. Detroit & Mil. R. Co.*, 20 Mich. 105; *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75; *Has-*

ken v. New York Cent. & H. R. R. Co., 65 Barb. (N. Y.) 129.

1. *Lyberg v. Northern Pac. R. Co.* (Minn. 1888), 38 N. W. Rep. 632, where the above principle was applied to a blacksmith in the employ of a railroad company with an incompetent assistant.

2. *Stafford v. Chicago, etc., R. Co.*, 114 Ill. 244; *Columbus, C. & I. C. R. Co. v. Troesch*, 68 Ill. 545; *Chicago & E. I. R. Co. v. Geary*, 110 Ill. 383; *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484; *Murphy v. St. Louis & I. M. R. Co.*, 71 Mo. 202; s. c., 2 Am. & Eng. R. R. Cas. 83; *McDermott v. Hannibal, etc., R. Co.*, 87 Mo. 285; s. c., 28 Am. & Eng. R. R. Cas. 528; *Catlin v. Mich. Cent. R. Co.*, 33 N. W. Rep. (Mich.) 515; *Hilts v. Chicago & G. T. R. Co.* 55 Mich. 437; s. c., 17 Am. & Eng. R. R. Cas. 628; *Davis v. Detroit & M. R. Co.*, 20 Mich. 105; *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411; *Mad River, etc., R. Co. v. Barber*, 5 Ohio St. 541; *Indianapolis, etc., R. Co., v. Love*, 10 Ind. 554; *Faulkner v. Erie, etc., R. Co.*, 49 Barb. (N. Y.) 324; *McMillan v. Saratoga, etc., R. Co.*, 20 Barb. (N. Y.) 449; *Baulec v. New York, etc., R. Co.*, 59 N. Y. 356; *Hay-*

competency or unskillfulness will not be presumed; in order to make either available as a ground of action, they must be proved, and merely showing the manner in which he did the particular act complained of, is not generally of itself sufficient to warrant such an inference. The burden is upon the servant to show negligence or unskillfulness in the co-servant through whose act the injury was inflicted.¹

In an action against a railroad company by one employe thereof, to recover damages for an injury caused by the alleged negligence or unskillfulness of another employe, the company will be presumed to have exercised due care in the employment of the latter, and to have had no knowledge of the defects of capacity or character imputed to him. But such presumption may be rebutted by evidence of his general reputation for unfitness, without proof that such reputation was known to the officers of the com-

den *v. Smithville Mfg. Co.*, 29 Conn. 557; *Moss v. Pacific R. Co.*, 49 Mo. 167.

1. *Summersell v. Fish*, 117 Mass. 312; *Thayer v. St. Louis, etc., R. Co.*, 22 Ind. 26; *Indianapolis, etc., R. Co. v. Love*, 10 Ind. 554; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 557; *Mad River R. Co. v. Barber*, 5 Ohio St. 541; *McMillan v. Saratoga, etc., R. Co.*, 20 Barb. (N. Y.) 449; *Faulkner v. Erie R. Co.*, 49 Barb. (N. Y.) 324; *McCarthy v. Bristol Ship Owners' Co.*, 10 L. R. Ir. 384; *Byrne v. Fennell*, 10 L. R. Ir. 397, n.

Wood on Master and Servant (2d ed.), 819, says: "*Prima facie*, where the law imposes a duty upon another, the law presumes that such duty was properly performed; hence, from the mere circumstances that the servant is in fact incompetent, and that injury has resulted to other servants therefrom, the law will not presume want of care on the part of the mas-

ter, although such facts are material circumstances, in connection with other facts, to establish want of care. Therefore the mere fact that a fellow-servant is incompetent, that materials have proved defective, or that the appliances or machinery used in the prosecution of the business have proved insufficient, does not tend even *prima facie* to establish negligence on his part; but the burden in all such cases is upon the servant seeking a recovery, to establish the fact that the injury resulted to him because the master did not exercise reasonable and proper care in these respects, or either of them; and this must be established as a fact in the case, and cannot result as an inference from the circumstance that the servant causing the injury was in fact incompetent, or that the materials or resources of the business were in fact defective."

pany.¹ It is not enough that the servant show that a similar accident occurred during his employment, unless it is also shown that it occurred through his fault or that the master was negligent in investigating and ascertaining where the fault lay.²

§ 90. Evidence.—General Reputation.—

Evidence of general reputation is admissible to prove the unfitness of a fellow-servant, and ignorance of such general reputation on the part of the master is itself negligence in a case in which proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative.³ Where a complaint alleges negligence in the employment of plaintiff's co-laborers, evidence of the quality of such co-laborers is admissible as a link in a chain of evidence, and, as such, cannot be objected to at the time when offered, even, though it afterwards appeared that the injury had not resulted from any unfitness on the part of such co-laborers.⁴ And it has been held that in an action against a railway company for the death of an engineer in consequence of a collision resulting from the yardmaster's negligence in sending him out when a coming train was past due, as bearing upon the competency of the yardmaster, questions as to the number of tracks in the depot yard, the number of engines ordinarily employed in switching, the average number of freight trains in the yard, and similar questions are relevant, as tending to show the character and importance of the work the yardmaster had charge of, and the need of

1. *Davis v. Detroit, etc., R. Co.*, 144 Mass. 186; *Tarrant v. Webb*, 18 C. B. 797; *Edwards v.*

2. *Baulec v. New York, etc., R. Railroad*, 4 C. & F. 530; *Mad River R. Co. v. Barber*, 5 Ohio St. 541;

3. *Davis v. Detroit & Mil. R. Co.*, 20 Mich. 105; *Summersell v. Fish*, 117 Mass. 312; *Gilman v. Eastern R.*

4. *Altee v. South Car. R. Co.*, 21 S. Car. 550.

experience and skill.¹ An old brakeman, who has worked upon a train operated by a certain engineer for two weeks, has been held qualified to testify as to the competency and carefulness of the engineer as to all matters which do not involve a technical knowledge of the machinery of the engine.²

§ 91. *Same.*—*Specific Acts of Negligence.*—

For the purpose of showing that an employer did not exercise due care, prudence, and caution in the employment of, or in retaining in his service, careful, prudent, and skillful persons, and for the purpose of charging the employer with notice of the incompetency of his employes, specific acts of negligence or unskillfulness of such employes may be proved, and it may be proved that such acts were known to the master or his agents prior to the employment of such persons, or that such employes were retained in service after notice of such acts.³ Yet, while evidence of single acts may be admissible to prove the incompetence of a servant, such evidence is not necessarily conclusive. Negligence, such as unfits a person for service, or such as renders it negligent in a master to retain him in his employ, must be habitual rather than occasional,

1. *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176; s. c., 2 Am. & Eng. R. R. Cas. 230.

2. *Houston, etc., R. Co. v. Patton* (Tex. 1888) 9 S. W. Rep. 175. In this case it was also held that the testimony of a locomotive engineer and machinist, who worked in defendant's shops from February to October, 1883, that a certain engineer in the employ of defendant was careless, because he had habitually brought his engines into the shops out of repair, and that the defects were such as would not have occurred if he had exercised proper care, is admissible in an action for

injuries alleged to have been caused by the negligence of such engineer on May 25, 1883, such habitual carelessness tending to show that he was careless or reckless prior to the injury.

3. *Pittsburg, etc., R. Co. v. Ruby*, 38 Ind. 294; *Lee v. Detroit Bridge & Iron Works*, 62 Mo. 565; *Huffman v. Chicago, etc., R. Co.* 78 Mo. 50; s. c., 17 Am. & Eng. R. R. Cas. 625; *Cooper v. Milwaukee & P. R. Co.*, 23 Wis. 668; *Couch v. Watson Coal Co.*, 46 Iowa, 17; *Louisville, etc., R. Co. v. Collins*, 2 Duv. (Ky.) 114; *Illinois Cent. R. Co. v. Reedy*, 17 Ill. 580; *Quimby v. Vermont Cent.*

or of such a character as renders it imprudent to retain him in service. A single exceptional act of negligence will not prove a servant to be incapable or negligent,¹ and has been held insufficient, to warrant the jury in inferring negligence on the part of the master in retaining such servant.² The correct rule is stated by the New York Court

R. Co., 23 Vt. 387; *Baulec v. New York & H. R. Co.*, 59 N. Y. 356; *Evansville & T. H. R. Co. v. Guyton*, 115 Ind. 450; s. c., 33 Am. & Eng. R. R. Cas. 311.

In *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 105, however, the Court refused to permit the introduction of specific acts of negligence on the part of a servant alleged to be incompetent, for the purpose of charging the defendant company with knowledge of the servant's incompetence. See also *Hatt v. Nay*, 144 Mass. 186, and *Robinson v. Fitchburg, etc.*, R. Co. 7 Gray (Mass.) 92.

1. *Baltimore Elevator Co. v. Neal*, 65 Md. 438.

The fact that a yardmaster sent an engine upon the track when a coming train was overdue, does not conclusively show that the company was negligent in keeping him in its service, since he might have had information showing that the train would not arrive for some time. *Mich. Cent. R. Co. v. Gilbert*, 46 Mich. 176; s. c., 2 Am. & Eng. R. R. Cas. 230.

But it has been held that the bringing of two railroad trains into collision is such a negligent act that evidence of that act alone will suffice to show the incompetency of the conductor who caused it. *Evansville & T. H. R. Co. v. Guyton*, 115 Ind. 450; s. c., 33 Am. & Eng. R. R. Cas. 311. Chief Justice Mitchell said: "It may be conceded that the

evidence in the record fully establishes the fact that Stice had been for years a faithful, vigilant, and competent brakeman, and that he had fairly earned his recent promotion to the position of freight conductor by long and diligent service for the company; and the idea is not to be tolerated, that the law will pronounce a person, who is shown to be qualified by years of efficient service, incompetent because of a single mistake or act of forgetfulness. The fact cannot, however, be disguised, that a single act with the circumstances surrounding it, where the consequences are so overwhelming as the bringing of two trains of cars, running at a high rate of speed, into collision on the same railroad track, may tend very strongly to show the incompetency of the actor to perform the service to which he was assigned."

In Missouri it has been held that whether one act of negligence is sufficient to establish incompetency in a servant depends on the character of the act. *McDermott v. Hannibal, etc.*, R. Co., 87 Mo. 285; s. c., 28 Am. & Eng. R. R. Cas. 528.

2. *Huffman v. Chicago, etc.*, R. Co., 78 Mo. 50; s. c., 17 Am. & Eng. R. R. Cas. 625.

In an action by a servant for injuries alleged to have been caused by the incompetency of a fellow-servant, where several facts are presented as bearing on the question of

of Appeals:¹ "When, as here, the general fitness and capacity of a servant is involved, the prior acts and conduct of such servant on specific occasions may be given in evidence, with proof that the principal had knowledge of such acts. The cases in which evidence of other acts of misconduct or neglect, of servants or employees whose acts and omissions of duty are the subject of investigation, have been held incompetent, have been those in which it has been sought to prove a culpable neglect of duty on a particular occasion by showing similar acts of negligence on other occasions. This class of cases does not bear upon the case in hand, and may be laid out of view. Proof of specific acts of negligence of a servant or agent on one or more occasions does not tend to prove negligence on the particular occasion which is the subject of inquiry. Where character, as distinguished from reputation, is the subject of investigation, specific acts tend to exhibit and bring to light the peculiar qualities of the man, and indicate his adaptation, or want of adaptation, to any position, or fitness or unfitness for a particular duty or trust. It is by many or by a series of acts that individuals acquire a general reputation, and by which their characters are known and described; and the actual qualities, the true characteristics of individuals—those qualities and characteristics which would or should influence and control in the selection of agents for positions of trust and responsibility—are learned and known. A principal would be without excuse should he employ for a responsible position, on the proper performance of the duties of which the lives of others might depend, one known to him as having the reputation of being an intemperate, imprudent, indolent, or careless man. He would be held liable to the fellow-servants of the em-

competency, it is not error to refuse a charge that plaintiff could not re-

cover, by showing a single act of negligence. *East Line & Red River* R. Co. *v.* *Scott* (Tex.), 10 S. W. Rep. 298.

1. *Baulec v. New York & H. R. Co.* 59 N. Y. 356.

ploye for any injury resulting from the deficiencies and defects imputed to the individual by public opinion and general report. Still more would he be chargeable if he had knowledge of specific acts showing that he possessed characteristics incompatible with the duties assigned him, and which might expose his fellow-servants and others to peril and harm. * * * An individual who by years of faithful service has shown himself trustworthy, vigilant, and competent, is not disqualified for further employment, and proved either incompetent or careless and not trustworthy, by a single mistake or act of forgetfulness and omission to exercise the highest degree of caution and presence of mind. The fact would only show, what must be true of every human being, that the individual was capable of an act of negligence, forgetfulness, or error of judgment. This must be the case as to all employes of corporations until a race of servants can be found free from the defects and infirmities of humanity. A single act may, under some circumstances, show an individual to be an improper and unfit person for a position of trust or any particular service ; as, when such act is intentional, and done wantonly, regardless of consequences, or maliciously. So, the manner in which a specific act is performed may conclusively show the utter incompetency of the actor, and his inability to perform a particular service. But a single act of casual neglect does not, *per se*, tend to prove the party to be careless and imprudent, and unfitted for a position requiring care and prudence. Character is formed and qualities exhibited by a series of acts, and not by a single act. An engineer might from inattention omit to sound the whistle or ring the bell at a road-crossing, but such fact would not tend to prove him a careless and negligent servant of the company. The company is only charged with the duty of employing those who have acquired a good character in respect to the qualifications

called for by the particular service ; and no one would say that a good character acquired by long service was destroyed or seriously impaired by a single involuntary and unintentional fault.¹ But this appeal does not necessarily depend upon the correctness of this view of the effect to be given to a single instance of neglect. All that the corporation defendant was bound to do, after the occurrence, was to inquire into and ascertain the facts, and act in the discharge or retention of the switchman, with reference to the facts as ascertained, as reasonable prudence and care would dictate ; and, if such care and caution were exercised, the company is not liable, although its general agent erred in judgment in retaining the switchman in the same service. Ordinary care and reasonable exercise of discretion and judgment is all that is necessary to absolve the corporation from the charge of neglect of duty in such a case."

In Massachusetts, however, the rule is otherwise. In a recent case it was decided that, in an action of tort for personal injuries caused by the overturning of a pile-driver which was in charge of defendant's foreman, by whose carelessness the accident was alleged to have occurred, evidence of the reputation of the foreman for skill and competency is admissible on behalf of plaintiff, but further evidence as to specific acts of carelessness on the part of the foreman, while employed on the same job, is inadmissible.²

1. *Murphy v. Pollock*, 15 Ir. C. L. 224.

2. *Hatt v. Nay*, 144 Mass. 286. Devens, J., said : " Because a servant may have been guilty of negligence on certain specified occasions, it by no means follows that he was on the occasion in question, or that he might not ordinarily be a careful and skillful workman and prop-

erly employed as such. The investigation of other individual acts of alleged carelessness on the foreman's part would have a necessary tendency to confuse the case by collateral inquiries ; to protract it indefinitely if these inquiries were carefully made ; and to mislead and distract a court or jury from the true issue."

§ 92. *Same.—Same.—*

In a suit for damages for personal injuries brought by a brakeman against a railroad company, in which the unskillfulness and incompetency of the engineer were charged as causes of the injury, evidence of the declarations of the engineer to the plaintiff, to the effect that he would as soon run over him as not, was held admissible to prove that the company did not use proper care in selecting the engineer, if supported by other satisfactory evidence.¹ But evidence that an engineer, alleged to have been incompetent, was discharged after the accident for which damages are sought occurred, and that he has since been guilty of similar acts of negligence, is not admissible to prove that the employer was guilty of negligence in employing him.² If the specific act of negligence which it is sought to introduce in evidence occurred after the accident which caused the injury, it is not admissible, as the question of the servant's competency must relate to the time of the injury. Thus, a recovery being sought against a railroad company, on the grounds only that it employed an engineer who was old, near-sighted, and unacquainted with the road, and, by reason of such defects, incompetent, and that a brake upon one of its cars was defective, which incompetency and defect are alleged to have caused the injury complained of, it was held error to have allowed proof of the fact that, after the accident complained of had occurred, such engineer ran his train (freight) without a brakeman a distance of several miles, and ran his engine off the track.³ A locomotive engineer's opinion that if he had obeyed the order of the yardmaster to place his engine on the main track when a coming train was past due, he would have gotten into trouble, is not admissible to

1. *Houston, etc., R. Co. v. Willie*, Iowa 17.

53 Tex. 318; s. c., 5 Am. & Eng. R. R. Cas. 541.

3. *Ransier v. Minneapolis & St. L. R. Co.*, 30 Minn. 215; s. c., 11 Am. & Eng. R. R. Cas. 647.

2. *Couch v. Watson Coal Co.*, 46

show that a railroad company was negligent in keeping the yardmaster in its employment unless the case had been brought to the knowledge of the company's officers.¹

§ 93. *Same.*—*Book of Accidents.*—

The *gravamen* of an action against a railroad company being the negligence and incompetency of an engineer in charge of a train at the time of an accident, a book kept by defendant's agents, containing an account of accidents on the road, showing that said engineer had once been suspended for allowing a non-employee and an incompetent person to run his engine, during which time an accident occurred, is admissible as evidence to prove the incompetency and carelessness of the engineer, and defendant's knowledge thereof.²

An engine attached to a train on defendant's road was thrown from the track by a misplaced switch which B., the switchman, had neglected to close, he being at the time engaged in conversation with another. Plaintiff's intestate, who was a fireman upon the engine, was killed. In an action to recover damages, plaintiff claimed that B. was inexperienced and incompetent, and that, by a reduction of the force employed, duties, too numerous, various, and distracting had been imposed upon B. It appeared that B. had been in defendant's employ for seven years, until three months before the accident, as baggageman at the station, occasionally acting as switchman. Three out of six men formerly employed were discharged, and the duties of switchman devolved upon B., which he had performed for three months. *Held*, that the question of B.'s competency must relate to the time of the injury; and, as he had performed the duties

of switchman for three months, so far as appeared, without fault or neglect, and was a man of ordinary intelligence, it appeared that he was clearly competent to perform those duties; that it was immaterial what fault defendant had committed in respect to the number of men employed or the duties imposed upon B., unless such fault contributed to the injury; that it appeared that his failure to close the switch did not arise from inability to perform the duties, but was the result of inattention and carelessness; that therefore the injury was caused by the negligence of a co-servant, for which defendant was not liable, and a verdict for plaintiff was error. *Harvey v. New York Cent. & H. R. R. Co.*, 88 N. Y. 481; s. c., 8 Am. & Eng. R. R. Cas. 515.

1. *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176; s. c., 2 Am. & Eng. R. R. Cas. 230.

2. *O'Hare v. Chicago & A. R. Co.* (Mo.), 9 S. W. Rep. 23.

§ 94. Acts of General Agents.—

Though a master has employed skillful and competent general servants, agents, or superintendents, he is liable for injuries received by inferior servants through the negligence of those employed by such general servants, agents, or superintendents without due care or inquiry, or retained by them after knowledge of their incompetency.¹ This is but the logical result of the true criterion of fellow-service.² It is one of the master's first duties to provide a suitable number of competent and efficient servants to carry on his business, and the agent or employe to whom the duty is delegated is his representative as to that duty. "It may, for the strongest reasons," says the Supreme Court of Texas, "be held, that when a corporation clothes an agent with power to select, employ, and discharge employes, and to manage and control the business in which they are engaged, that the corporation should be held responsible for the want of care by such agent, which leads to the employment of incompetent servants, by reason of whose negligence or incompetency injury results to other servants; for there is an implied duty, if not contract, upon the part of the master to employ competent and careful servants, with reference to which the engagement between the master and servant is made; and from this responsibility it seems reasonable that the master should not be permitted to discharge himself, by delegating his power to some other person to do that which is incumbent upon himself."³ This is illustrated by a Pennsylvania

1. *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104; *Texas, etc., R. Co. v. Whitmore*, 58 Tex. 276; s. c., 11 Am. & Eng. R. R. Cas. 195; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Baulec v. New York & H. R. Co.*, 59 N. Y. 356; *Pittsburg, F. W. & C. R. Co. v. Ruby*, 38 Ind. 294; *Gilman v. Eastern R. Co.*, 13 Allen (Mass.) 433; *Tyson v. South & N. Ala. R. Co.*, 61 Ala. 554; *Walker v. Bolling*, 22 Ala. 294; *Quincey Mining Co. v. Kitts*, 42 Mich. 34; *McDermott v. Hannibal. etc. R. Co.*, 87 Mo. 285; s. c., 28 Am. & Eng. R. R. Cas. 528; *Henry v. Brady*, 9 Daly (N. Y.) 142; *Huntingdon, etc., R. Co. v. Decker*, 84 Pa. St. 419.

2. See *ante* § 23.

3. *Texas, etc., R. Co. v. Whit-*

case, where a brakeman brought suit to recover damages for personal injuries caused by the negligence of a conductor. The plaintiff rested his right to recover upon the alleged carelessness of the superintendent of the company, whose duty it was to employ conductors, in the selection of this conductor. Chief Justice Lowrie delivered the opinion of the Court, declaring that the superintendent stood for the company in this respect, and that his negligence was the negligence of the company.¹ From this it follows that notice of the incompetency or negligence of a fellow-servant to one who thus represents the master is notice to him. Thus, it has been held that notice to the master mechanic of a railroad company, whose duty it was to employ and discharge engineers and firemen, of their practice in violating its orders, is notice to the company.² But notice of the incompetency of a fellow-servant to one whose duty is confined to notifying trainmen when they are expected to be on duty, is not notice to a railroad corporation.³ And it has been held that notice of the habitual negligence and general bad habits of a car-inspector, brought home to the master mechanic of a railroad company, will not make the company liable for an injury to another servant of the company, resulting from the negligence of the car-inspector, unless it is shown that power was conferred by the company upon the master mechanic to employ and discharge the car-inspector.⁴

§ 95. Pleading.—

Where the servant shows in his complaint or declaration that the injury for which he sues the master was

more, 58 Tex. 276; s. c., 11 Am. & Cas. 554.

Eng. R. R. Cas. 195.

1. *Frazier v. Pennsylvania R. Co.*, 32 Mich. 510.

38 Pa. St. 104.

2. *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261; s. c., 5 Am. & Eng. R. R.

3. *Michigan Cent. R. Co. v. Dolan*,

32 Mich. 510.

4. *Kidwell v. Houston & G. N. R.*

Co., 3 Woods (U. S.) 313.

caused or occasioned by the negligence of his fellow-servant, he must also allege either that the master had not exercised ordinary care and prudence in the employment of such fellow-servant, or that he had retained him in its service after he had received notice that he was negligent in the discharge of the duties of his position. This much must be stated in relation to the negligence of the master; and with respect to himself in such a case, the injured servant must aver, in his complaint, that, at the time he entered the master's service, he had no knowledge of the negligent habits of the fellow-servant through whose negligence he has alleged that he was injured.¹ Undoubtedly the negligence of an employer in selecting or retaining incompetent servants must be distinctly charged.² But it would seem that the want of knowledge on the part of an injured servant of his fellow-servant's incompetence, should be presumed. In a late Illinois case³ it was said: "The contention of appellant, as we understand it, is that where one is employed as an operative in a particular branch of service, he is bound to investigate and find out at his peril whether the common master has used reasonable care and prudence in the selection of those already employed in the same branch of service. The law imposes

1. *Lake Shore, etc., R. Co. v. Stupak*, 108 Ind. 1; s. c., 28 Am. & Eng. R. R. Cas. 323. See also *Indiana, etc., R. Co. v. Dailey*, 110 Ind. 78.

The proof must sustain the allegations. In an action for an injury alleged to have been received by reason of the incompetency and brutal conduct of defendant's foreman, of which defendant had, or might have had, knowledge, proof that the foreman cursed plaintiff, and compelled him to take the position in which he was hurt, and that in unloading pipes from a car, the accident which occurred was occasioned

by a defect in the iron bar placed under the pipe, and the failure to place pieces of wood under the pipes to prevent them from slipping, varies from the petition. *Ischer v. St. Louis Bridge Co.* (Mo. 1888), 8 S. W. Rep. 367.

2. *Blake v. Maine Cent. R. Co.*, 70 Me. 60; *Lawler v. Androscoggin R. Co.*, 62 Me. 463; *Moss v. Pacific R. Co.*, 49 Mo. 167; s. c., 8 Am. Rep. 126.

3. *United States Rolling Stock Co. v. Wilder*, 116 Ill. 100; s. c., 25 Am. & Eng. R. R. Cas. 414.

no such duty. One thus employed is warranted in assuming that the master has discharged his duty in this respect, and until notice to the contrary is brought home to the employe he may safely act upon that hypothesis." A Tennessee case was an action against a railroad company, by a widow of an engineer in charge of a train, who was killed by reason of a collision occasioned by a misplaced switch. The declaration contained two counts—one count based upon the ground that the switch was dangerous for want of a target, and the other upon the incompetency of the switch-tender negligently retained by the company. The jury found the issues joined on both counts in favor of the plaintiff, and it was held that even if there was no testimony to sustain the first count, the verdict on the second count would be good.¹

§ 96. Questions for Jury.—

The incompetency of a fellow-servant, and the master's negligence in employing or retaining an incompetent servant, are questions of fact for the jury.² It has also been

1. *East Tenn., Va. & Ga. R. Co. v. Tarrant v. Webb*, 18 C. B. 797; *Mer- Gurley*, 12 Lea (Tenn.) 46; s. c., 17 *ry v. Wilson*, 1 S. & B. 326; *Ormond v. Holland*, El. Bl. & El. 102.

2. *Gilman v. Eastern R. Co.*, 10 *Allen (Mass.)* 233; *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176; s. c., 2 Am. & Eng. R. R. Cas. 230; *Mares v. Northern Pac. R. Co. (Dak.)*, 17 Am. & Eng. R. R. Cas. 620; *Hilts v. Chicago & G. T. R. Co.*, 55 Mich. 437; s. c., 17 Am. & Eng. R. R. Cas. 628; *Mann v. Delaware & H. Canal Co.*, 91 N. Y. 495; s. c., 12 Am. & Eng. R. R. Cas. 199; *Indianapolis, etc., R. Co. v. Love*, 10 Ind. 554; *Evansville, etc., R. Co. v. Guyton*, 115 Ind. 450; s. c., 33 Am. & Eng. R. R. Cas. 311; *Columbus, etc., R. Co. v. Webb*, 12 Ohio St. 475; *Hard v. Vermont, etc., R. Co.*, 32 Vt. 473; Where an employe sues a railroad company for injuries alleged to have resulted from the negligence of a co-employe, and evidence is introduced on the trial tending to show the habitual negligence of such co-employe, and that the plaintiff had knowledge thereof, and the defendant attempted, by asking the Court to give certain instructions, to submit the question of the co-employe's incompetency and habitual negligence, and the plaintiff's knowledge thereof, to the jury, but the Court refused; *held*, error. *Kansas Pac. R. Co. v. Peavey*, 34 Kan. 472.

held in Indiana¹ that the wisdom of a policy of a railroad company of filling all vacancies by promotion from lower positions is a question of fact for the jury, the Court saying : " It should be remembered that Stice had served the company as brakeman until quite recently before the unfortunate accident ; and while his service as brakeman is not to be disregarded in determining his competency to act in the more responsible position of conductor, it does not follow, without more, that because he was an efficient and competent brakeman, and fit for promotion, he was also competent to take charge of and run a wild train. These considerations lead us to conclude that we cannot disturb the verdict and judgment on the evidence."

But the jury is not authorized to decide that a person is unfit to be employed as a brakeman on a railroad on account of what they saw, or supposed they saw, or could read in his face and manner, while testifying before them as a witness, and determine from that alone that a railroad company was negligent in employing such a person.²

1. *Evansville & T. H. R. Co. v. Guyton*, 115 Ind. 450; s. c., 33 Am. & Eng. R. R. Cas. 311.

2. *Corson v. Maine Cent. R. Co.*, 76 Me. 244; s. c., 17 Am. & Eng. R. R. Cas. 634. In Massachusetts, however, it has been held that the jury

may judge from the appearance and conduct of a witness whether he is competent to perform the duties of car inspector. *Keith v. New Haven, etc., R. Co.* 140 Mass. 175; s. c., 23 Am. & Eng. R. R. Cas. 421.

CHAPTER VII.

STATUTES.

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§ 97. Introductory.—

In England, and in eight States and two Territories of this country, the common law doctrine of co-service itself has been so vigorously attacked that the law-making powers have deemed it expedient to do away with it, either partially or altogether. These statutory changes began as early as 1855, and at the present time the subject is being agitated in several States where the common law rule still prevails. It will be the purpose of this chapter to exam-

ine these statutes, setting them out in full, as well as the construction which the Courts have placed upon them.

§ 98. English Employers' Liability Act, 1880.—

On the 7th of September, 1880, after much agitation, the English Parliament changed the law of that country relative to the Employers' liability by passing what was popularly known as the "Gladstone Bill." The following is the full text of the Act, with the decisions construing it in the notes :

EMPLOYERS' LIABILITY ACT, 1880.

(43 & 44 Vic. c. 42) 7th Sept., 1880.

An Act to extend and regulate the liability of employers to make compensation for personal injuries suffered by workmen in their service.

Be it Enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords, Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

SECT. I. Where, after the commencement of this Act, personal injury is caused to a workman,¹—

1. An employer, when sued under the act, for personal injury to a workman caused by any of the matters mentioned in § 1 of the Act, cannot avail himself of the defense that the injury was caused by the negligence of a fellow-servant or that the workman had contracted to take upon himself the risks incident to the employment; but he may avail himself of the defense of contributory negligence on the part of the workman, and also, under § 2, sub-sec. 3, of his failure to give notice of the defect or negligence which caused the injury. The deceased was employed as fireman at the defendant's brewery. In the engine-room, at some distance from the floor, was a valve to turn on steam to a donkey-engine. This valve was only reached by means of a ladder

(1.) By reason of any defect in the condition of ways,¹ works,² machinery³ or plant,⁴ connected with or used in the business of the employer; or

placed against a lower pipe, but, by reason of a bend in the last-mentioned pipe, the ladder (though in itself perfect), being without hooks or stays, was unsafe for the purpose for which it was used. The defendant had himself seen the ladder so used. The deceased was found dead in the engine-room, having been apparently killed by the ladder slipping while he was upon it. In an action by his personal representative under the Act, the county court judge found that there was a defect in the condition of the plant within the meaning of § 1, sub-sec. 1, of the act, and that, although the deceased knew of the defect, he was excused from informing the defendant of it, because he was aware that the latter knew of it. *Held*, that this finding was warranted by the evidence, and that contributory negligence on the part of the deceased was not necessarily proved by the mere fact that he knew that the work was of itself dangerous. *Weblin v. Ballard*, L. R. 17 Q. B. Div. 122.

1. A workman was employed in the defendants' iron works, and part of his duty was to take iron in balls, by means of a two-wheeled car, along a roadway of iron plates. While he was so engaged the car struck against a piece of a substance

4. This section applies to a case where the plant is unfit for the purpose for which it is used, though no part of it is shown to be unsound. Plaintiff, a workman in defendants' employment, was injured by reason of the breaking of a ladder, which

used for lining the furnaces, which had been negligently placed projecting into the roadway, and a ball fell on him, causing personal injuries from which he died. In an action against the employers, *held*, that the obstruction caused by the substance projecting into the roadway was not a defect in the condition of the way within the meaning of the Act, and that the defendants were not liable. *McGiffin v. Palmer's Shipbuilding & Iron Co.*, L. R. 10 Q. B. Div. 5.

2. The expression "works" must be taken to mean works already completed, and not works in course of construction which are, on completion, to be connected with or used in the business of the employer. *Howe v. Finch*, L. R. 17 Q. B. Div. 187.

3. The mere fact that a machine is dangerous to a workman employed to work with it does not show that there is a defect in the condition of the machine within the meaning of this section, inasmuch as by § 2, sub-sec. 1, of the Act (*infra*), the only defects in respect of which the employer is liable are defects implying negligence of the employer or some one in his service entrusted by him with the duty of seeing that the machine is in proper condition. The plaintiff in an action was being used to support a scaffold. The ladder was insufficient for the purpose for which it was being used, and the scaffold and ladder had been placed and were being used under the directions of one of the defendants. *Held*, that, under the above

(2.) By reason of the negligence of any person in the service of the employer, who has any superintendence en-

tion under the Employers' Liability Act, 1880, was employed by the defendants to work at a carding machine. Part of the machine consisted of a wheel or pulley upon which, while in motion, the plaintiff had to place a band. The disc of the wheel had holes in it, and while the plaintiff was putting on the band his thumb slipped through one of these holes, the result being that it was caught between the wheel and the bed-plate of the machine and cut off. It was proved that, though the wheel and consequent friction. In the defendants' mill there were machines of both sorts, and it did not appear that any complaint had previously arisen with regard to the wheels with holes, the plaintiff himself stating that he had never complained of the machine because it had never entered into his head that it was dangerous. *Held*, by Lindley and Lopes, L.JJ., Lord Esher, M. R., dissenting, that there was no evidence of any defect in the machine implying negligence in the defendants or any one in their service and therefore that the defendants were not liable. *Walsh v. Whiteley*, L. R. 21 Q. B. Div. 371.

The plaintiff, a lad of nineteen, circumstances, there was evidence that the plaintiff had been injured by reason of a defect in the condition of the plant, owing to the negligence of his employer, within the meaning of the Act. *Cripps v. Judge*, L. R. 13 Q. B. Div. 583.

In an action to recover compensation under the Act, it appeared that the plaintiff was in the employment of the defendant, who was a wharfinger,

was employed in the defendants' paper-mill at a machine for cutting jute. The material passed under a roller which conveyed it to the cutter; but the roller being in several pieces or sections, with interstices between them into which the jute sometimes got, and so impeded the these wheels were sometimes made without such holes, they were very commonly made with them, the object being to reduce the weight of action of the machine, it was necessary (or usual) to remove it by the hand. In doing this the plaintiff lost three fingers. The defect had been pointed out to the defendants, who to remedy it procured a roller in one piece; but the accident happened before the new roller was placed. The maker swore that with care both rollers were equally safe. The jury having found that the injury to the plaintiff was caused by a defect in the machine known to the defendants and not remedied by them, *held*, that this finding was warranted by the evidence. *Paley v. Garnett* L. R. 16 Q. B. Div. 52.

The Act applies to a case where the machine, though not defective in its construction, was, under the circumstances in which it was used, and for the purposes of his business the owner of carts and horses. It was the duty of the plaintiff to drive the carts and to load and unload the goods which were carried in them. Among the horses was one of a vicious nature and unfit to be driven even by a careful driver. The plaintiff objected to drive this horse, and told the foreman of the stable that it was unfit to be driven, to which

trusted to him, whilst in the exercise of such superintendence;¹ or

(3.) By reason of the negligence of any person in the service of the employer, to whose orders or directions the workman, at the time of the injury, was bound to con-

calculated to cause injury to those using it. The deceased, a workman in the employment of the defendants, was killed by a piece of coke falling from a lift used at a blast-furnace belonging to them. The lift consisted of two platforms which ascended and descended alternately, and at the time when the deceased was injured he was removing empty barrows from the platform which was at rest at the bottom of the lift. There was evidence that the accident arose either from the sides of the lift not being fenced so as to prevent coke from falling over, or from the lower platform not being roofed so as to protect those working on it from falling coke. *Held*, that under the circumstances there was a "defect in the condition" of the lift for which the defendants were liable. *Haske v. Samuelson & Co.*, L. R. 12 Q. B. Div. 30.

1. In an action to recover compensation under the Act, it appeared that the plaintiff, with other workmen, was employed by the defendant to stow bales of wool in the hold of a ship. The workmen were divided into gangs, the foreman of the plaintiff's gang being B. The bales were hauled to the hatchway and the foreman replied that the plaintiff must go on driving it, and that if any accident happened his employer would be responsible. The plaintiff continued to drive the horse, and while sitting on his proper place in the cart was kicked by the animal

dropped down to the workmen below; B., who worked on the deck, giving a signal to the men below before the bales were dropped. The plaintiff, who was below, was injured by a bale which, according to his statement, came down without any warning. *Held*, that the plaintiff was not entitled to recover, for there was no evidence that his injury was caused by the negligence of a person who had "any superintendence intrusted to him, whilst in the exercise of such superintendence," or by reason of the "negligence of any person in the service of the defendant to whose orders or directions the plaintiff was bound to conform." *Kellard v. Rooke*, L. R. 19 Q. B. Div. 585.

An employer may be liable, under the Act, where personal injury is caused to a workman "by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence," although the superintendent, when negligent, is voluntarily assisting in manual labor. *Osborne v. Jackson*, 11 Q. B. Div. 619.

The plaintiff and one J. were employed and his leg was broken. *Held*, that the horse which injured the plaintiff was "plant" used in the business of the defendant, and that the vice in the horse was a "defect" in the condition of such plant, within the meaning of § 1 of the act.

form, and did conform, where such injury resulted from his having so conformed ;¹ or

(4.) By reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf ; or

(5.) By reason of the negligence of any person in the service of the employer, who has the charge or control of any signal points, locomotive engine, or train upon a railway,—²

ployed with others by the defendants in loading sacks of corn into the hold of a ship. J.'s duty was to guide the beam of the crane by means of a guy-rope, and to give directions when to lower and hoist the chain. He neglected to use the guy-rope, and the sacks in consequence fell down the hatchway, and hurt the plaintiff, who was working in the hold. *Held*, that J. was "engaged in manual labor," and was not "a person having superintendence intrusted to him," within the meaning of the Act. *Shaffers v. General Steam Navigation Co.*, L. R. 10 Q. B. Div. 356.

1. The plaintiff, a boy employed by the defendants, a railway company, was assisting a carman of the defendants, under whose directions he was, in unloading from a van three large iron window frames. The frames were standing upright in the van, secured at each end to the hooks of the van by a string. The carman untied the string at one end of the frames, and the plaintiff untied the string at the other end. The carman did not expressly order the plaintiff to untie the string, but the plaintiff stated that he did so

without orders because he had done so on previous occasions, and that the carman saw him untie the string and made no objection. The carman then removed one of the frames without retying the two remaining frames, leaving them standing unsecured. They directly afterwards fell on the plaintiff, causing him injuries in respect of which he sued the defendants for compensation under the Employers' Liability Act, 1880. *Held*, that there was on the above facts evidence of an injury to the plaintiff by reason of the negligence of a fellow-workman to whose orders he was bound to conform, and did conform, and which resulted from his having so conformed. *Milward v. Midland R. Co.*, L. R. 14 Q. B. Div. 68.

2. In an action for compensation under the Act, the evidence showed that it was the duty of F., a workman employed in the signal department of the defendants' railway to clean, oil, and adjust the points and wires of the locking apparatus at various places along a portion of the line, and to do slight repairs, that for these purposes he was, with several other men, subject to the orders

The workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.¹

SECT. II. A workman shall not be entitled, under this Act, to any right of compensation or remedy against the employer in any of the following cases (that is to say):—

(1.) Under sub-section 1 of section I. unless the defect, therein mentioned, arose from, or had not been discovered or remedied, owing to the negligence of the employer, or of some person in the service of the employer,

of an inspector in the same department, who was responsible for the points and locking gear, which were moved and worked by men in the signal boxes, being kept in proper condition, and that F. having taken the cover off some points and locking gear in order to oil them, negligently left it projecting over the metals of the line, whereby injury was caused to a fellow-workman. *Held*, that there was no evidence for the jury that F. had "charge or control" of the points within the meaning of § 1, sub-sec. 5, of the Act, so as to make the defendants liable for his negligence. *Gibbs v. Great Western R. Co.*, L. R. 12 Q. B. Div, 208; 11 Q. B. Div. 22.

H., who was in the employ of a railway company as a "capstan-man," without giving the usual warning, propelled a series of trucks along a line of rails in a goods station, and injured the plaintiff, who was engaged in similar work at the other end of the line, about 100 yards off. The capstan was set in motion by hydraulic power communicated to it by H. from a sta-

tionary engine at a distance. *Held*, that there was evidence to warrant the jury in finding that H. was a person who had the charge or control of "a train upon a railway" under § 1, sub-sec. 5, of the Act. *Cox v. Great Western R. Co.*, L. R. 7 Q. B. Div. 106; s. c., 6 Am. & Eng. R. R. Cas. 485.

The meaning of the term "railway," as used in this connection, is not confined to railways belonging to railway companies such as are subject to the provisions of the Railway Regulation Acts; but the sub-section applies also to a temporary railway laid down by a contractor for the purposes of the construction of works. *Doughty v. Firbank*, L. R. 10 Q. B. Div. 358.

1. This evidently means only that the defense of "common employment" shall not be available for the master; nor that the facts and circumstances of the workman's employment are not to be considered, *e. g.*, if there is a question of contributory negligence. *Pollock on Torts* (Appendix B), 477.

and intrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition.

(2.) Under sub-section 4, of section I., unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned ; provided that where a rule or by-law has been approved or has been accepted as a proper rule or by-law by one of Her Majesty's Principal Secretaries of State, or by the Board of Trade, or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed, for the purpose of this Act, to be an improper or defective rule or by-law.

(3.) In any case where the workman knew of the defect or negligence which caused his injury, and failed, within a reasonable time, to give, or cause to be given, information thereof to the employer, or some person superior to himself, unless he was aware that the employer or such superior already knew of the said defect or negligence.

SECT. III. The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment, and in the district in which the workman is employed at the time of the injury.

SECT. IV. An action for the recovery, under this Act of compensation for an injury, shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death ; provided always, that in case of death the want of such notice shall be no bar to the maintenance of such action, if the judge shall be of opinion that there was reasonable excuse for such want of notice.

SECT. V. There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under or through a workman in respect of any cause of action arising under this Act, any penalty or part of a penalty which may have been paid in pursuance of any other Act of Parliament to such workman, representatives, or persons in respect of the same cause of action; and where an action has been brought under this Act by any workman, or the representatives of any workman, or any persons claiming by, under or through such workman, for compensation in respect of any cause of action arising under this Act, and payment has not previously been made of any penalty or part of a penalty, under any other Act of Parliament in respect of the same cause of action, such workman, representatives or person shall not be entitled thereafter to receive any penalty or part of a penalty under any other Act of Parliament, in respect of the same cause of action.

SECT. VI. (1.) Every action for recovery of compensation under this Act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may be by law removed.

(2.) Upon the trial of any such action in a county court before the judge without a jury, one or more assessors may be appointed for the purpose of ascertaining the amount of compensation.

(3.) For the purpose of regulating the conditions and mode of appointment and remuneration of such assessors and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under this Act in a county court, and otherwise preventing multiplicity of such actions, rules and regulations may be made, varied and repealed from time to time, in the same

manner as rules and regulations for regulating the practice and procedure in other actions in county courts.

"County Court" shall, with respect to Scotland, mean the "Sheriff's Court," and shall, with respect to Ireland, mean the "Civil Bill Court."

In Scotland any action under this Act may be removed to the Court of Session at the instance of either party, in the manner provided by and subject to the conditions prescribed by section 9 of the Sheriff Courts (Scotland) Act, 1877.

In Scotland the sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries.

SECT. VII. Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.¹

The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

1. A notice of injury given under § 4 omitted to state the date of the injury, and the judge at the trial found that the defendant was not prejudiced in his defense by the omission, and that it was not for the purpose of misleading. *Held*, that the omission of the date was a "defect or inaccuracy" in the notice within the meaning of § 7, and therefore did not render the notice invalid. *Carter v. Drysdale*, L. R. 12 Q. B. Div. 91.

The plaintiff's notice of action stated that she was injured in consequence of the defendants' negli-

gence in leaving a certain hoist in their warehouse unprotected, whereby her foot was caught in the casement of the hoist and crushed. At the trial the jury found that the accident occurred through the negligence of a superintendent in the warehouse in allowing the plaintiff, a young girl, to go in the hoist alone. *Held*, that the notice of action sufficiently stated the "cause of the injury" within § 7 of the Employers Liability Act, 1880. *Clarkson v. Musgrave*, L. R. 13 Q. B. Div. 386.

The notice of action need not be expressed in strictly technical lan-

The notice may also be served by post by a registered letter addressed to the person on whom it is to be served, at his last known place of residence or place of business; and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and, in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered.

When the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the office, or, if there be more than one office, any one of the offices of such body.

A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice, shall be of opinion that the defendant in the action is prejudiced in his defense by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.

SECT. VIII. For the purpose of this Act, unless the context otherwise requires,—

guage; it is enough if it substantially conveys to the mind of the person to whom it is given the name and address of the person injured, and the cause and date of the injury. A letter from the plaintiff's solicitor gave only the date of the injury, and stated that the plaintiff was and had for some time past been under treatment at a hospital "for injury to his leg." *Held*, that having regard to the proviso at the end of § 7 the defect in the notice did not render it invalid. *Stone v. Hyde*, L. R. 13 Q. B. Div. 76.

The notice must be in writing. *Moyle v. Jenkins*, L. R. 8 Q. B. Div. 116. Where a workman, on the day

he had been injured, made a verbal report of such injury to his employer's inspector, who took down the details in writing and sent them to the employer's superintendent, and afterwards the workman's solicitor wrote a letter to the employer, stating that he was instructed by such workman to apply for compensation for injuries received on the employer's premises, "particulars of which have already been communicated to your superintendent" *Held*, that such letter did not refer to any other writing, and was not a notice in compliance with the act. *Keen v. Millwall Dock Co.*, L. R. 8 Q. B. Div. 482.

The expression, "person who has superintendence entrusted to him," means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labor ;¹

The expression, "employer," includes a body of persons corporate or unincorporate ;

The expression, "workman," means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies.²

1. In an action to recover compensation under the Act, it appeared that the plaintiff, with other workmen, was employed by the defendant to stow bales of wool in the hold of a ship. The workmen were divided into gangs, the foreman of the plaintiff's gang being B. B. was himself a laborer, working on deck, and he gave the signal to the men below when the bales were being dropped down the hatchway into the hold. The plaintiff, who was below, was injured by a bale which, according to his statement, was dropped down without sufficient warning being given by B. to enable him to get out of the way. *Held*, that the plaintiff was not entitled to recover, as B. was not a person who had superintendence intrusted to him within § 1, sub-sec. 2, as defined by § 8, nor was there any evidence that the injury resulted from the plaintiff having conformed to any order of B. within § 1, sub-sec. 3, assuming that B. was a person to whose orders the plaintiff was bound to conform. Judgment of the Queen's Bench Division (19 Q. B. Div. 585) affirmed. *Kellard v. Rooke*, L. R. 21 Q. B. Div. 367.

See also notes to § 1, sub-sec. 2.

2. 38 and 39 Vic. chap. 90, § 10.

In this Act the expression "workman" does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a laborer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labor, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labor. See Fall's "Employers' Liability for Personal Injuries to their Employees."

An omnibus conductor engaged at daily wages, paid daily, is not a "person to whom the Employers and Workmen Act, 1875, applies," and therefore is not entitled to the benefit of the Employers' Liability Act. *Morgan v. London General Omnibus Co.*, L. R. 13 Q. B. Div. 832 ; 12 Q. B. Div. 201.

In an action to recover compensation under the Employers' Liability Act, 1880, it appeared that the plaintiff was in the employment of the defendant, who was a wharfinger, and for the purposes of his business the

SECT. IX. This Act shall not come into operation until the first day of January, 1881, which date is in this Act referred to as the commencement of this Act.

SECT. X. This Act may be cited as the Employers' Liability Act, 1880, and shall continue in force till the thirty-first day of December, 1887, and to the end of the then next session of Parliament and no longer, unless Parliament shall otherwise determine;¹ and all actions commenced under this Act before that period shall be continued as if the said Act had not expired.

§ 99. *Alabama.*—

In 1885 the Legislature of the State of Alabama passed an Act regulating employers' liability for injuries to their employees.² This statute closely resembles the English Act. It reads as follows:

§ 2590. *Liability of Master or Employer to Servant or Employee for Injuries.*—When a personal injury is re-

owner of carts and horses. It was the duty of the plaintiff to drive the carts and to load and unload the goods which were carried in them. Among the horses was one of a vicious nature and unfit to be driven even by a careful driver. The plaintiff objected to drive this horse, and told the foreman of the stable that it was unfit to be driven, to which the foreman replied that the plaintiff must go on driving it, and that if any accident happened his employer would be responsible. The plaintiff continued to drive the horse, and while sitting on his proper place in the cart was kicked by the animal, and his leg was broken. *Held*, that the plaintiff was a "workman" within the definition in § 8 of the Act.

By an agreement in writing between H. & Co.'s manufacturers, and J.,—reciting that J. having a knowl-

edge of mechanics, and H. & Co. requiring the services of a person having such knowledge "to assist the firm as a practical working mechanic in developing ideas they, the firm, might wish to carry out, and to himself originate and carry out ideas and inventions suitable to the business of such firm if such inventions were approved by them,"—it was mutually agreed that J. should be employed by the firm "for the purposes above specified." *Held*, that J. was not "a mechanic or workman" within the Employers and Workmen Act, 1875. *Jackson v. Hill*, L. R. 13 Q. B. Div. 618.

1. The operation of the Act has been indefinitely continued. At this writing there is another Employers' Liability bill pending in Parliament.

2. Code 1886, § 2590 *et seq.* Passed Feb'y. 12, 1885.

ceived by a servant or employe in the service or business of the master or employer,¹ the master or employer is liable to answer in damages to such servant or employe, as if he were a stranger, and not engaged in such service or employment, in the cases following :

1. When the injury is caused by reason of any defect in the condition of the ways, works, machinery,² or plant

1. In *Georgia Pac. R. Co. v. Propst* (Ala.), 4 So. Rep. 711, it appeared that a night watchman about a station was accustomed to go upon defendant's trains to a distant station for his meals, and, while going thither on a freight train, was asked by the conductor, one of the brakemen being sick, to make a coupling for him, in doing which he was injured. It was held that there was no such employment as brakeman as rendered the company liable for the injury under the Act. The Court said: "Under the statute the party claiming damages must be an employe at the time of the injury by contract, express or implied, binding on the defendant; and the injury must be received while rendering the service required by the particular employment or in obeying the order of a superior to which the employe is bound to conform. Injury received while doing other more hazardous service not pertaining to the employment, by way of accommodation, or self-assumed, is not sufficient. * * * The burden is on the plaintiff to prove a case within the provisions of the statute defining the liability of employers."

2. In *Georgia Pac. R. Co. v. Brooks* (Ala. 1888), 4 So. Rep. 289, it was held that a hammer used for driving spikes into cross-ties on a railroad is not machinery, within the

meaning of this section. The Court said: "A machine is a piece of mechanism which, whether simple or compound, acts by a combination of mechanical parts, which serve to create or apply power to produce motion, or to increase or regulate the effect. As used in the Patent Act it has been defined to be 'a concrete thing, consisting of parts, or of certain devices, or combination of devices.' *Burr v. Bury*, 1 Wall. 531. Primarily, machinery means the work of a machine; the combination of the several parts to put it in motion. But we do not understand that the term was used in the statute in its primary sense; but, having a more enlarged signification, should be construed as so used, nothing appearing to show that it was intended to be used in its primary or restricted sense. Thus understood, the term 'machinery' embraces all the parts and instruments intended to be and actually operated, from time to time, exclusively by force created and applied by mechanical apparatus or contrivance, though the initial force may be produced by the muscular strength of men or animals, or by water or steam, or other inanimate agency. *Seavey v. Insurance Co.*, 111 Mass. 540. The carding, spinning, and weaving machines, together with the instrumentality by which the prime motive

connected with or used in the business of the master or employer.¹

2. When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence.

3. When such injury is caused by reason of the negligence of any person, in the service or employment of the master or employer, to whose orders or directions the servant or employe, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from his having so conformed.

4. When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer in that behalf.²

power is created or applied, constitute the machinery of a cotton-mill. When cars, though used at times, and at other times detached, are formed into a train, to which the propelling force is imparted by means of a locomotive, the entire train constitutes machinery connected with or used in the business. * * * * A hammer is a tool or instrument ordinarily used by one man in the performance of manual labor. It may be made an essential part of machinery when intended to be and is operated by means thereof; but when disconnected from any other mechanical appliances, and operated singly by muscular strength directly applied, such tool or instrument is not machinery in its most comprehensive signification or in

the meaning of the statute."

1. A recovery cannot be had under this act for injuries received by a locomotive engineer by the fall of a trestle, the foundation of which was washed out by an unusually great and destructive flood, where it appears that the trestle was constructed in the manner usual with the best managed railroad, and that it had afforded a safe passage for trains for 15 years. *Columbus & W. R. Co. v. Bridges* (Ala. 1889), 5 So. Rep. 864.

2. Negligence cannot be imputed to a railroad company under this section from the fact that a locomotive engineer attempted to cross a defective trestle after the safety signal was given, where it appears that the signal was not given from

5. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal, points, locomotive, engine, switch, car, or train upon a railway, or of any part of the track of a railway.

But the master or employer is not liable under this section, if the servant or employe knew the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer, unless he was aware that the master or employer, or such superior, already knew of such defect or negligence;¹ nor is the master or employer liable under sub-division 1, unless the defect therein mentioned arose from, or had not been discovered or remedied, owing to the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant, were in proper condition.²

§ 2591. *Personal Representative may Sue if the Injury Results in Death.*—If such injury results in the death of the servant or employe, his personal representative is entitled

the end of the trestle being approached by the train, as required by the rules of the company relating to signals. *Columbus & W. R. Co. v. Bridges* (Ala. 1889) 5 So. Rep. 864.

1. An employer knowing of a defect or negligence cannot set up that the employe, by continuing in the work, has thereby waived his right to sue for injuries received in such employment. *Mobile & B. R. Co. v. Holborn* (Ala. 1888), 4 So. Rep. 146. The absence of contributory negligence need not be set out in the complaint. *Columbus, etc., R. Co.*

v. Bradford (Ala. 1889), 6 So. Rep. 90.

2. "This provision manifestly relates, not to defensive matter, but to the negligence of the defendant, and facts would probably have to be averred in the complaint, if drawn under the first clause of the section, which would show that the defect causing the injury was within these limitations. As this point does not arise in the case at bar, however, it is not decided." *Columbus, etc., R. Co. v. Bradford* (Ala. 1888), 6 So. Rep. 90.

to maintain an action therefor, and the damages recovered are not subject to the payment of debts or liabilities, but shall be distributed according to the statute of distributions.¹

§ 2592. *Damages Exempt.*—Damages recovered by the servant or employe, of or from the master or employer, are not subject to the payment of debts, or any legal liabilities incurred by him.

§ 2593. *Liability of Personal Representative and Sureties.*—The personal representative and sureties on his bond are liable to the parties in interest for the due and legal distribution of all damages recovered by such representative under section 2588, or section 2589, or section 2591, and are subject to all remedies, which may be pursued against such representative and sureties for the due administration of personal assets.

This Act being in derogation of the common law, the Supreme Court of Alabama² holds that the inference is that the terms of the Act clearly import the changes intended, and their operation will not be enlarged by construction further than may be necessary to effectuate the nearest ends. The Court say: "Notwithstanding, a narrow and restrictive view of the Act should not be taken. In its construction the Court should consider its objects, have regard to the intentions of the Legislature, and take a broad view of its provisions, commensurate with the proposed purposes. The doctrine that prevailed prior to its passage had been carried to an extent which met with disfavor; and the tendency of the legislation has been in many of the States to abrogate as to particular corporations, or to modify as to all masters or employers, the rules which had governed their non-liability. Our statute,

1. Evidence that deceased had a disease likely to shorten life is admissible, since the continuance of life constitutes an element of damage. *Columbus & W. R. Co. v. Bridges* (Ala. 1889), 5 So. Rep. 864.
2. *Mobile & B. R. Co. v. Holden*, 4 So. Rep. 146.

as far as it goes, is a substantial copy of the English Act, entitled the 'Employers' Liability Act'; some of the provisions of which had previously received a judicial construction. Its enactment by the Legislature in substantially the same language is persuasive of a legislative adoption of that construction."

§ 100. Georgia.—

The first State to make any changes in the common law doctrine of co-service was Georgia. This is rather remarkable in view of the fact that at the time the law was amended, 1855, the State was largely agricultural, railroads were exceedingly few, and manufacturing enterprises almost unknown. However, in the year mentioned the Legislature passed the following Acts which have been incorporated into the Code of 1873.

§ 2083. "Railroad companies are common carriers, and liable as such. As such companies necessarily have many employes who cannot possibly control those who should exercise care and diligence in the running of trains, such companies shall be liable to such employes as to passengers for injuries arising from the want of such care and diligence."

§ 3036. "If the person injured is himself an employe of the company, and the damage was caused by another employe and without fault or negligence on the part of the person injured,¹ his employment by the company shall be no bar to the recovery."

"This means, clearly," say the Supreme Court,² "if the

1. As to burden of proving or disproving contributory negligence under this Act, see *Campbell v. Atlanta, etc. R. Co.*, 52 Ga. 488; *Thompson v. Central R. & B. Co.*, 54 Ga. 509; *Central R. & B. Co. v. Kelly*, 58 Ga. 107. In *Savannah, etc., R. Co. v. Barber*, 71 Ga. 644, it was held that a charge to the effect that the burden is on the plaintiff to show not only himself blameless, but the defendant negligent, is erroneous. "The moment the plaintiff proves to the jury either, the legal presumption proves the other until rebutted, and the defendant must rebut that presumption."

2. *Central R. Co. v. Mitchell*, 63

damage was caused by another employe, and was not caused by the fault or negligence of the employe hurt, then he may recover. If he immediately or remotely, directly or indirectly, caused it, or any part of it, or contributed to it at all, then he cannot recover; but though he had been at fault about something wholly disconnected with the transaction, or was at the time at fault about a matter that had nothing to do with the catastrophe, then he may recover. And such is the law in all the books and all the cases bearing on the point. And it must be so. Suppose the man whose duty it is to light the lamps failed to do so and was at fault, and owing to a defective embankment the cars were wrecked and he injured, could he not recover when his failure to light the lamps had nothing upon earth to do with the catastrophe, and did not cause it or contribute a mite to it?"

It has been held that under section 2202 of the Code of this State, which provides that "the principal is not liable to one agent for injuries arising from the negligence or misconduct of other agents about the same business," an employe cannot recover against the master for injuries caused by a co-employe, though the latter was his superior.¹

§ 101. Iowa.—

Seven years after the passage of the Georgia Act the State of Iowa changed the common law. In 1867 the following provisions were enacted:

"Every corporation operating a railway shall be liable

Ga. 173; s. c., 1 Am. & Eng. R. R. first time made that the Act, if unlimited in its operation would be unconstitutional, the Court adhered to its former decision and held the law constitutional. See also *Georgia R. & B. Co. v. Goldwire*, 56 Ga. 196.

In *Thompson v. Cent., etc., R. Co.*, 54 Ga. 509, the Supreme Court held that the statute was not limited to any class of employes. And in *Georgia R. Co. v. Ivey*, 73 Ga. 499, when asked to reconsider its former decision, and the point was for the

1. *McGovern v. Columbus Mfg. Co.* (Ga. 1888), 5 S. E. Rep. 492.

for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employes of the corporation, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employes, when such wrongs are in any manner connected with the use and operation of any railroad on or about which they shall be employed; and no contract which restricts such liability shall be legal and binding."¹

This change of the common law, it will be seen, extends no further than to employes engaged in the business of operating railroads, and not to all persons employed by the corporation without regard to their employment. The Legislature had in mind the fact that corporations owning and operating railways may engage in other business which may be within the scope of the objects of their organization, yet not at all, or very remotely, connected with the use of their roads. In such cases employes by whom such affairs are conducted acquire no rights under this Act. Their occupation does not expose them to the hazards incident to the use of railways.² Accordingly, the labor of the courts has been to determine what employes are con-

1. Rev. Code, 1880, Vol. I. p. 342. § 1307: Under the statute, prior to the passage of chap. 169, Laws of 1862, it was held, in harmony with the consent of common law authority, that the principal is not liable for damages, sustained by an employe for the negligence of a co-employe in the same general service, and that the 14th section of the Act, entitled An Act to Grant Railroad Companies the Right of Way, approved Jan. 18, 1853, did not change the general rule on the subject. (Sullivan v. The M. & M. R. Co., 11 Iowa, 421). After the Act of 1862 took

effect, it was held that while the 7th section thereof gave an employe of a railroad company a right to recover for injuries caused by the negligence of a co-employe, the liability was nevertheless measured by a different standard and rule, as to negligence, from what it is in case of injuries to passengers. While extraordinary care and caution are required with respect to passengers, ordinary care only is due to the employe. Note, Rev. Code, 1880, § 1307.

2. Schroeder v. Chicago, etc., R. Co., 41 Iowa, 344.

nected with the "use and operation" of a railway. We find a host of decisions upon this point.

A workman in a railway company's shops is not within the statute.¹ But a person engaged in working on a bridge and **obliged** to ride on the company's train,² a section hand,³ and a hand **engaged** on a gravel or dirt train⁴ have been held to be within the Act. An employe whose duties consist in wiping off engines and in opening and **shutting** the doors of a round-house is not such an employe "connected with the use and operation of the railway" as can recover for the negligence of a fellow-servant in shutting such doors.⁵ Where the regular brakeman of a train is absent, and the proper and safe management of the train so requires, the conductor has authority to supply the place of such absent brakeman; and for the time being such per-

1. *Potter v. Chicago, etc., R. Co.*, 46 Iowa, 399.

2. *Schroeder v. Chicago, etc., R. Co.*, 41 Iowa, 344.

3. *Frandsen v. Chicago, etc., R. Co.*, 36 Iowa, 372.

But where nothing more is shown than that plaintiff was a section hand, and, when injured, was engaged in loading a car, this service does not pertain to the operation of the railway. *Smith v. Burlington, etc., R. Co.*, 59 Iowa, 73; s. c., 6 Am. & Eng. R. R. Cas. 149.

4. *McKnight v. Iowa & M. R. Const. Co.*, 43 Iowa, 406; *Deppe v. Chicago, etc., R. Co.*, 36 Iowa, 52. See *Locke v. Sioux City R. Co.*, 46 Iowa, 109. Plaintiff, a section hand in the employ of defendant, was directed to get on a loaded moving train, by the conductor and others in charge of the train, to go to another place to help to unload it, and on attempting to do so was thrown down and received personal injuries. *Held*, that such injuries occurred in

the "use and operation" of the train within the meaning of the statute. *Rayburn v. Central Iowa R. Co.* 74 Iowa, 637. An employe of a railroad company, whose duty it is to assist in loading and unloading gravel cars, and to perform any other service required of him in or about such work, and to ride back and forth on the gravel cars, is a person employed in the operation of the road within the meaning of the Act. *Handelun v. Burlington, C. R. & N. R. Co.*, 72 Iowa, 709.

5. *Malone v. Burlington, etc., R. Co.*, 61 Iowa, 320; s. c., 11 Am. & Eng. R. R. Cas. 165.

But a "wiper" in the employment of a railroad company who has charge of an engine and is performing the duties of another employe, is not a volunteer and the company is liable under the Act to a brakeman for injuries sustained through his negligence. *Whalen v. Chicago, etc., R. Co.* (Iowa, 1888), 39 N. W. Rep. 894.

son is an employe of the railroad and entitled to recover for injury caused by the negligence of a co-employe.¹ If an employe is injured while riding on a hand-car, through the negligence of the boss in charge, the company is liable.² And a private detective, injured in walking on the track in accordance with directions of the company, and negligently run over, is within the protection of the statutory provision.³ A person injured in operating a ditching-machine which is carried on a car and worked by the movement of the car on the railroad track, comes within the provision; and evidence tending to show that the injury was caused by the negligence of co-employes should be submitted to the jury.⁴ But where an employe was injured by appliances connected with the round-house, it was held that it was not error to instruct the jury that, if they found that it was a part of plaintiff's duty to keep such appliances in a safe condition, or that it was the duty of another employe of the same kind to do so, and that they both, or either of them, neglected to do so, then the plaintiff could not recover, the employes not being engaged in the operation of the road.⁵ And where employes are engaged in

1. *Sloan v. Central Iowa, etc., R. Co.*, 62 Iowa, 728; s. c., 11 Am. & Eng. R. R. Cas. 145.

2. *Hoben v. Burlington, etc., R. Co.*, 20 Iowa, 562.

3. *Pyne v. Chicago, etc., R. Co.*, 54 Iowa, 223.

4. *Nelson v. Chicago, etc., R. Co.*, 73 Iowa, 576.

A laborer employed by a railway company, on a train used for hauling sand, to assist in loading and unloading the cars, rode upon the train in passing between the pit and the points on the track where the sand was deposited. *Held*, that as, in the performance of his duties, he was exposed to all the ordinary

risks arising from the operation of the train, he was within the class of employes to whom the statute gives a remedy. *Handelun v. Burlington, etc., R. Co.*, 72 Iowa, 709. But an employe whose duty is to repair cars while standing upon the track, and who was sometimes required to ride on the trains of the company from place to place, is not employed in the operation of the road in such sense as to bring him within the protection of the provision. *Foley v. Chicago, etc., R. Co.*, 64 Iowa, 644.

5. *Manning v. Burlington, etc., R. Co.*, 64 Iowa, 240; s. c., 15 Am. & Eng. R. R. Cas. 171.

elevating coal to a platform, to supply the engine, their duties are not so connected with the use and operation of the railroad, as that one of them could recover for injuries received from the negligence of the other.¹

Injuries to an employe by reason of the negligence of another, both engaged in the work of repairing a track, such injury not resulting from the operation of the railroad, are not within the provision of the statute.² And where an accident, by which an employe is injured, is caused by the act of an inferior employe under the acting direction of such superior, the latter cannot recover for an injury received.³ An employe who stands in the relation of vice-principal to the men under his control is an employe, within the meaning of the Act, and can recover of a railroad company by reason of the negligence of the men selected by himself, and whom he may discharge or retain in his employment (or the employment of the company) as he sees fit. It is not provided that the negligent and the injured employe shall be co-employees in the same general employment, in the sense that they must be equal in power and authority; all that is required is, that both shall be employes of the corporation.⁴ A receiver who is managing a railway under the direction of a court, is within this section, and may be charged and a recovery obtained against him, as a person operating a railway.⁵ The fact that a lessee may be held liable under this section, does not prevent recovery against the owner of the road.⁶ And

1. *Stroble v. Chicago, etc., R. Co.*, 70 Iowa, 555; s. c., 28 Am. & Eng. R. R. Cas. 510. And see *Luce v. Chicago, etc., R. Co.*, 67 Iowa, 75.

2. *Matson v. Chicago, etc., R. Co.*, 68 Iowa, 22.

3. *Dewey v. Chicago, etc., R. Co.*, 31 Iowa, 373.

A foreman of a railroad company, with power to hire and discharge

hands, is a co-employe with the men

under him, within the meaning of the statute. *Houser v. Chicago, etc., R. Co.*, 60 Iowa, 230; 46 Am. Rep. 65.

4. *Houser v. Chicago, R. I. & P. R. Co.*, 60 Iowa, 230; s. c., 8 Am. & Eng. R. R. Cas. 500.

5. *Sloan v. Central Iowa R. Co.*, 62 Iowa, 728; s. c., 11 Am. & Eng. R. R. Cas. 145.

6. *Bower v. Burlington, etc., R. Co.*, 42 Iowa, 546.

the running of special trains over the railway by a construction company, in constructing it, is operating a railway within the meaning of the statute.¹ Like the Georgia Act the statute does not exonerate the injured party from the necessity of exercising reasonable care.²

§ 102. **Kansas.**—

In 1874 the following Act passed the Legislature of Kansas.

“Every railroad company organized or doing business in this state shall be liable for all damages done to any employe of such company, in consequence of any negligence of its agents, or by any misunderstanding of its engineers, or other employes, to any person sustaining such damage.”³

This Act has not been given the extended application which its terms seem to warrant. It was adopted from the statute of Iowa, and the judicial construction given to the Act in that state has followed it into Kansas. The maxim *ita lex scripta est* to the contrary, therefore, it has been held by the Courts to embrace only those persons engaged in the hazardous business of railroading. The care or diligence the Act exacts toward the employe, is that degree of diligence which men in general exercise in respect to their own concerns; and contributory negligence of the employe bars a recovery.⁴ Notwithstanding the statute provides that every railway company shall be liable for all damages done to any employe in consequence of any negligence of its agents or by any mismanagement of its engineers or other employes, the Court has held that the knowledge or notice, act or omission, for which the company is responsible, must be that of some agent or employe having authority or duty in the premises.⁵

1. McKnight v. Iowa & M. R. Co., The act took effect March 4, 1874.
43 Iowa, 406.

2. Murphy v. Chicago, etc., R. Co., 45 Iowa, 661.
25 Kan. 35; s. c., 5 Am. & Eng. R. R. Cas. 594.

3. Passed in 1874, chap. 93, § 1.
5. Solomon R. Co. v. Jones, 30

A person employed upon a construction train to carry water for the men working with the train, and to gather up tools and put them in the caboose or tool car, is within the statute.¹ And a section-man employed by a railway company to repair its roadbed, and to take up old rails out of its track, and put in new ones, who is injured, without his fault, by the negligence of his co-employee in permitting an iron rail, intended to be placed in the track, to fall upon him while he is assisting in removing the rail from a push-car on the track, is within the terms of the Act.² In the case of *Union Trust Co. v. Thomason*³ the plaintiff was in the employment of the Union Trust Company, then operating and controlling the Missouri, Kansas & Texas Railway, as a trackman, whose principal duty consisted in repairing the track of the railway. To facilitate the work, the trackmen, or "section gang," were furnished by the company with a hand-car, operated by the men of the "gang," which enabled them to rapidly transport themselves and their tools from one portion of the track to another. A place was appointed at Station S., in which, when not in use, the hand-car and tools were kept; and at the close of the day's labor on the track, it was the duty of the men to transport the hand-car and tools to this station, and there properly dispose of them until required the next day. On April 30, 1878, the plaintiff at the close of his work on the track, was ordered by his foreman to put his tools on the hand-car, and to get on himself, which order he obeyed—the employees occupying three hand-cars, and the plaintiff riding upon the middle car. On the way to the station the rear car was propelled so fast by the men upon it that it,

Kan. 601; s. c., 15 Am. & Eng. R. R. Cas. 201.

1. *Missouri Pac. R. Co. v. Haley*, 25 Kan. 35; s. c., 5 Am. & Eng. R. R. Cas. 594.

2. *Union Pac. R. Co. v. Harris*, 33 Kan. 416; See also *Atchison, etc.*,

R. Co. v. Koehler, 37 Kan. 463; s. c., 31 Am. & Eng. R. R. Cas. 315, where the Kansas Act was applied to a section-hand and another employe who let a rail drop on him.

3. 25 Kan. 1; s. c., 5 Am. & Eng. R. R. Cas. 589.

by the culpable negligence of the men operating it, was thrown against the middle car, which could not escape in consequence of the nearness of the forward car, and thereby the middle car was thrown from the track and the plaintiff seriously hurt. It was held that the plaintiff was injured while in the line of his duty, and that he was within the provisions of the Act, and was entitled to recover for all damages received by him in consequence of the culpable negligence or mismanagement of his co-employees.

Negligence is not to be presumed, but must be proven; and where the evidence in an action for damages against a railroad company, under the statute shows that all the co-employees exercised toward the injured employe, the degree and care of diligence which prudent persons would ordinarily exercise under like circumstances, no liability is established against the company.¹

§ 103. *Massachusetts.*—

One of the most complete and comprehensive Acts passed in the United States is in force in the state of Massachusetts. The Act was modelled after the Employers' Liability Act, 1880, yet there are many important differences. It is entitled "*An Act to extend and regulate the liability of employers to make compensation for personal injuries suffered by employes in their service.*" It was passed in the year 1887,² and reads as follows:

SECTION 1. Where, after the passage of this Act, personal injury is caused to an employe, who is himself in the exercise of due care and diligence at the time:—

(1.) By reason of any defect in the condition of the ways, works or machinery connected with or used in the business of the employer or of any person in the service of the employer, which arose from or had not been discov-

1. *Missouri Pac. R. Co. v. Haley*, 25 Kan. 35; s. c., 5 Am. & Eng. R. R. Cas. 594. 2. Acts and Resolves of Massachusetts, 1887, chap. 270.

ered or remedied owing to the negligence of the employer or of any person in the service of the employer and entrusted by him with the duty of seeing that the ways, works or machinery were in proper condition ;¹ or

(2.) By reason of the negligence of any person in the service of the employer, entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence.

(3.) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine or train upon a railroad, the employe, or in case the injury results in death the legal representatives of such employe shall have the same right of compensation and remedies against the employer as if the employe had not been an employe of nor in the service of the employer, nor engaged in its work.

SECTION 2. Where an employe is instantly killed or dies without conscious suffering, as the result of the negligence of an employer, or of the negligence of any person for whose negligence the employer is liable under the provisions of this Act, the widow of the deceased, or in case there is no widow, the next of kin, provided that such next of kin were at the time of the death of such employe dependent upon the wages of such employe for support, may maintain an action for damages therefor and may recover in the same manner, to the same extent, as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered.

SECTION 3. The amount of compensation receivable un-

1. A declaration alleging that plaintiff and another, employes of defendants, had the duty of seeing that a hanging stage, used in supporting them while painting, was kept in a proper condition, and that according to the usual manner of managing such stages plaintiff had charge of one end, and his co-servant of the other, and the latter failed to fasten his end securely, causing it to fall and do the injuries complained of, states no cause of action, under this Act. *Ashley v. Hart*, 147 Mass. 573.

der this Act in cases of personal injury shall not exceed the sum of four thousand dollars. In case of death, compensation in lieu thereof may be recovered in not less than five hundred and not more than five thousand dollars, to be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable; and no action for the recovery of compensation for injury or death under this Act shall be maintained, unless notice of the time, place and cause of the injury is given to the employer within thirty days, and the action is commenced within one year, from the occurrence of the accident causing the injury or death. But no notice given under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of the injury: *provided* it is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby.

SECTION 4. Whenever an employer enters into a contract, either written or verbal, with an independent contractor to do part of such employer's work, or whenever such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer for injuries to the employes of such contractor or subcontractor, by reason of any defect in the condition of the ways, works, machinery or plant, if they are the property of the employer, or furnished by him, and if such defect arose or had not been discovered or remedied, through the negligence of the employer or of some person entrusted by him with the duty of seeing that they were in proper condition.

SECTION 5. An employe or his legal representatives shall not be entitled under this Act to any right of compensation or remedy against his employer in any case where such employe knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or

caused to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, who had intrusted to him some general superintendence.

SECTION 6. Any employer who shall have contributed to an insurance fund created and maintained for the mutual purpose of indemnifying an employe for personal injuries for which compensation may be recovered under this Act, or to any relief society formed under chapter two hundred and forty-four of the Acts of the year eighteen hundred and eighty-two, as authorized by chapter one hundred and twenty-five of the Acts of the year eighteen hundred and eighty-six, may prove, in mitigation of the damages recoverable by an employe under this Act, such proportion of the pecuniary benefit which has been received by such employe from any such fund or society on account of such contribution of said employer, as the contribution of such employer to such fund or society bears to the whole contribution thereto.

SECTION 7. This Act shall not apply to injuries caused to domestic servants, or farm laborers, by other fellow employes, and shall take effect on the first day of September, eighteen hundred and eighty-seven.

§ 104. *Minnesota.*—

Chapter 13 of the Laws of 1887 reads as follows: "Every railroad corporation owning or operating a railroad in this State shall be liable for all damages sustained by any agent or servant thereof, by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained within this State, and no contract, rule, or regulation between such corporation and any agent or servant shall impair or diminish such liability: provided, that nothing in this act shall be so construed as to render any railroad company liable for damages sustained by any employe, agent, or servant while

engaged in the construction of a new road, or any part thereof, not open to public travel or use."

Although the act applies in terms to "any agent or servant" of a railroad company, yet in a recent case¹ the Supreme Court decided that it should be considered as applying only to those employes engaged in operating the railroads, and so exposed to the peculiar dangers attending that business, Chief Justice Gilfillan saying: "The frequency and magnitude of the dangers to which those employed in operating railroads are exposed; the difficulty, sometimes impossibility, of escaping from them with any amount of care, when they come; the fact that a great number of men are employed, co-operating in the same work, so that no one of them can know all the others, their competency, skill, and care, so that he may be said to voluntarily assume the risk arising from the want of skill or care by any one of the number,—are a sufficient reason for applying a rule of liability on the part of the employer to the employe so employed different from that ordinarily applied between master and servant. But no just reason can be suggested why such difference should be founded, not on the character of the employment, nor of the dangers to which those employed are exposed, but on the character only of the employer. We can see why the employer's liability should be greater when the business is that of operating a railroad, but cannot see why one individual or corporation should be held to a rule of liability different from that applied to another, when the employment and its hazards are precisely the same. We cannot illustrate this better than by using an illustration employed by the Supreme Court of Iowa in *Deppe v. Railroad Co.*² 'Suppose a railroad company employ several persons to cut the timber on its right of way where it is about to extend its road, and the land-owner employs

1. *Lavalley v. St. Paul, etc., R. Co.* 2. 36 Iowa, 52.
(March, 1889), 41 N. W. Rep. 974.

a like number of persons to cut the timber on a strip of equal length alongside such right of way. If one of each set of employes shall be injured by the negligence of a co-employe, and the railroad employe can under the statute maintain an action against his employer and the other cannot, then it is clear that the law does not apply upon the same terms to all in the same situation.' The Legislature might intend to make such a difference, but it would require unmistakable terms to make us think so. We do not find such to be the character of the terms used in this statute. That language is rather indicative that it was intended to confine its operation to the case of employes engaged in operating a railroad, and necessarily exposed to the hazards attending that business, and not to take in the case of all employes of a railroad company, without regard to the kind of work in which they are engaged. No other reason can be given for excepting in the proviso 'employes while engaged in the construction of a new road, or part thereof, not open to public travel or use,' though some of the dangers of that business may be in some degree similar to those of operating a road after it is open to public travel and use; that is, when it is operated. The terms of the proviso go far to show an intent to limit the effect of the Act to companies operating railroads, and in that part of their business. The deceased, not being employed in operating the railroad, did not come within the rule established by the Act."

§ 105. *Mississippi.*—

"Every railroad company shall be liable for all damages which may be sustained by any person in consequence of the neglect or mismanagement of any of their agents, engineers or clerks, or for the mismanagement of their engines; but for injury to any passenger upon any freight train not being intended for both passengers and freight,

such company shall not be liable *except for the gross negligence of its servants.*"¹

This statute, it will be seen does not entirely abrogate the fellow-servant rule. It has been held that a brakeman on one train of a railroad company is the fellow-servant of the employes operating another train of the same company, and cannot recover for injuries caused by the negligence of the employes operating such other train.²

§ 106. *Montana.*

By imposing on a railroad company the duty of exercising towards its servants, the extreme care which it owes to its passengers, this statute carries its liability beyond that imposed by the statutes of any other state or territory. The Act reads as follows: "That in every case the liability of the corporation to a servant or employe acting under the orders of his superior shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employe not appointed or controlled by him, as if such servant or employe were a passenger."³

§ 107. *Rhode Island.*—

The Rhode Island Act embraces only the cases of common carriers. It reads as follows: "If the life of any person, being a passenger in any stagecoach, or other conveyance, when used by common carriers, or the life of any person, whether a passenger or not, in the care of proprietors of, or common carriers by means of, railroads or steamboats, or the life of any person crossing upon a public highway with reasonable care, shall be lost by the reason of the negligence or carelessness of such common carriers, pro-

1. Revised Code of 1880, p. 306, Miss. 977; s. c., 8 Am. & Eng. R. R. Cas. 171. § 1054.

2. *McMaster v. Illinois Cent. R. Co.*, (Miss.) 4 So. Rep. 59, and see *Chicago, etc., R. Co. v. Doyle*, 60

3. Rev. Stat. 1879, p. 471, § 318; enacted in 1873.

prietor or proprietors, or by the unfitness or negligence or carelessness of their servants or agents, in this state, such common carriers, proprietor or proprietors, shall be liable to damages for the injury caused by the loss of life of such person, to be recovered by action of the case, for the benefit of the husband or widow and next of kin of the deceased person, one-half thereof to go to the husband or widow, and one-half thereof to the children of the deceased."¹ The Supreme Court of this state has held that the Act applies generally to all common carriers, whether by rail, steamboat, or coach. It extends to carriers by water, as well as by land.²

§ 108. Wisconsin.—

In Wisconsin we find the only state which, after abrogating the common law rule, has returned to it again. The following Act was passed in 1875, and, under the pressure brought to bear by the railways, was repealed in 1880.³

"Every railroad corporation shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other servant or agent thereof, without contributory negligence on his part, when sustained within this state, or when such agent or servant is a resident of, and his contract of employment was made in this state; and no contract, rule or regulation between any such corporation and any agent or servant shall impair or diminish such liability."⁴

Under this Act it has been held that in an action against a railway company for injuries to an employe, where the whole evidence shows beyond dispute that the sole cause of the injuries was the use of one bolt of insufficient length in fastening a slat of the ladder of a freight car, together with the somewhat decayed condition of the wood at the

1. Pub. Stats. 1882, p. 553, chap. 204, § 15.

2. *Chase v. American Steamboat Co.*, 10 R. I. 79.

3. Laws 1880, chap. 232.

4. Laws of 1875, approved March 4; Rev. Stat. § 1816; *Gumz v. Chicago, etc., R. Co.*, 52 Wis. 672; s. c., 5 Am. & Eng. R. R. Cas. 583.

place of such bolt, and that there was no external indication of these defects, and the person injured had been frequently in charge of the same car and in the habit of using the same ladder—there was no error in directing a nonsuit.¹ The Act was held to be constitutional soon after adoption and not to be limited to those employed in operating railroads.²

§ 109. Wyoming.—

"An Act to Protect Railroad Employees who are Injured while Performing their Duty," was passed by the Legislature of Territory of Wyoming in 1869. It reads as follows: "Any person in the employment of any railroad company in this Territory, who may be killed by any locomotive, car, or other rolling stock, whether in the performance of his duty or otherwise, his widow or heirs may have the same right of action for damages against such company as if said person so killed were not in the employ of said company; any agreement he may have made, whether verbal or written, to hold such company harmless or free from an action for damages in the event of such killing, shall be null and void, and shall not be admitted as testimony in behalf of said company in any action for damages which may be brought against them; and any person in the employ of said company who may be injured by any locomotive, car, or other rolling stock of said company, or by other property of said company, shall have his action for damages against said company the same as if he were not in the employ of said company; and no agreement to the contrary shall be admitted as testimony in behalf of said company."

SECT. 2. "This Act shall take effect from and after its passage."³

1. *Ballou v. Chicago, etc., R. Co.*, 54 Wis. 257.

2. *Ditherner v. Chicago, etc., R. Co.*, 47 Wis. 138.

3. *Comp. Laws, Wyoming* (1876) p. 512, chap. 97, § 1. Approved December 7, 1869.

The territorial court of last resort has not, in the twenty years that have elapsed since its passage, been called upon to construe this Act.

§ 110. Statutes of Other States not Affecting the Rule.—

The broad provisions of the statutes of Maine and Missouri in regard to liability for death caused by negligence were at one time supposed to refer to the case of injuries received from the negligence of fellow-servants. It has now been decided, however, that they have no such application.¹ And the same is true of the Colorado Act.²

1. *Carle v. Bangor, etc., R. Co.*, 43 Me. 269; *Proctor v. Hannibal & St. Jo. R. Co.*, 64 Mo. 112. Overruling *Schultz v. Pacific R. Co.*, 36 Mo. 13, and *Connor v. Chicago, etc., R. Co.*, 59 Mo. 285.

Rev. Stat. (Mo. 1879), Vol. I., p. 349, chap. 25. § 2121, reads as follows: "*Damages for Injuries Resulting in Death in Certain Cases—When and by Whom Recoverable.*—Whosoever any person shall die from any injury resulting from or occasioned by the negligence, unskilfulness, or criminal intent of any officer, agent, servant, or employe, whilst running, conducting, or managing any locomotive, car, or train of cars; or of any master, pilot, engineer, agent, or employe, whilst running, conducting, or managing any steamboat, or any of the machinery thereof; or of any driver of any stage-coach, or other public conveyance, whilst in charge of the same as a driver; and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or in any steamboat or the machinery thereof, or in any stage-coach or other public conveyance,

the corporation, individual or individuals, in whose employ any such officer, agent, servant, employe, master, pilot, engineer, or driver shall be at the time such injury is committed, or who owns any such railroad, locomotive car, stage-coach, or other public conveyance, at the time any injury is received, resulting from, or occasioned by any defect or insufficiency above declared, shall forfeit and pay, for every person or passenger so dying, the sum of \$5,000, which may be sued for and recovered: First, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or, third, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor. In suits instituted under this section it shall be competent for the defendant, for his defense, to show that the defect or insufficiency named in this section was not of a negligent defect or insufficiency."

2. "Whenever any person shall

The Dakota Code (the Code of California is exactly the same in this respect), which enacts that "an employer is not bound to indemnify his employe for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed in the same general business," has been held not to apply to losses suffered by an employe in consequence of the negligence of another person employed by the same employer in another, and not in the same general business.¹ The Tennessee statute requiring railroad companies to take certain precautions when any object is perceived on the track in advance of a moving train does not in any way affect the fellow-servants rule.² The fact that "mining-bosses" are appointed

die from an injury resulting from, or occasioned by, the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employe, while running, conducting, or managing any locomotive, car, or train of cars, or of any driver of any coach or public conveyance whilst in charge of the same as driver, and when any passenger shall die from any injury resulting from, or occasioned by, any defect or insufficiency in any railroad, or any part thereof, or in any locomotive or car, or in any stage-coach or other public conveyance, the corporation, individual or individuals, in whose employ any such officer, agent, servant, employe, master, pilot, engineer, or driver, shall be at the time such injury is committed, or who owns any such railroad, locomotive, car, stage-coach, or other public conveyance, at the time any such injury is received, and resulting from, or occasioned by, defect or insufficiency above described, shall forfeit and pay for every person and passenger so injured the sum of not exceeding

\$5,000, and not less than \$3,000, which may be sued for and recovered," etc. Gen. Laws. Colo. p. 342, § 1. The word "person" in this Act does not include employes or servants, and servants of the same master, injured by the negligence of fellow-servants, while acting in a common employment, are not embraced within the provisions of the Act. *Atchison, etc., R. Co. v. Farrow*, 6 Colo. 498; s. c., 11 Am. & Eng. R. R. Cas. 239.

1. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642; s. c., 24 Am. & Eng. R. R. Cas. 407. In *Elliot v. Chicago, etc., R. Co.* (Dak. 1889), 41 N. W. Rep. 758, it was held that a section foreman and a train conductor are co-employees within the purview of Civil Code Dak. § 1130, exempting an employer from liability to one of his servants for the negligence of another servant "engaged in the same general business."

2. *East Tenn., etc., R. Co. v. Rush*, 15 Lea (Tenn.), 145; s. c., 25 Am. & Eng. R. R. Cas. 502.

under a statute which prescribes their duties, does not change their relation of fellow-servants to the miners if the statute has been complied with as to their selection, and it does not appear that they were incompetent or the mine-owner negligent in employing them.¹ And a statute which provides that a bell or whistle shall be placed on every locomotive engine, and shall be rung or sounded by the engine-man or fireman 60 rods from any highway crossing, and until the highway is reached, and that the "corporation owning the railroad shall be liable, to any person injured, for all damages sustained" by reason of neglect so to do, does not make the corporation liable for an injury caused by negligence of the fireman in this respect, to a fellow-servant.²

§ 111. *Contributory Negligence.*—

To entitle the servant to recover under these statutes he must be free from negligence himself; but in an action against a railroad company by one of its employes to recover for personal injury occasioned by the negligence of co-employes, the plaintiff is held only to the exercise of ordinary care to entitle him to recover,—such care as men of ordinary judgment, intelligence, and prudence would exercise under like circumstances; and an instruction that any negligence, or slight negligence, on the part of the plaintiff would prevent a recovery, would imply and hold the plaintiff to a higher degree of care than is by the law required of him, and is properly refused.³ In Kansas, where the doctrine of comparative negligence prevails, in an action against a railway company for personal injuries, brought by an employe of the company, in a case where the company is liable only for ordinary negligence, and not for slight neg-

1. *Delaware & H. Canal Co. v. Car-* Eng. R. R. Cas. 243.
roll, 89 Pa. St. 374. 3. *Missouri Pac. R. Co. v. Mackey*,
2. *Randall v. Baltimore & O. R.* 33 Kan. 298; s. c., 22 Am. & Eng. R.
Co., 109 U. S. 478; s. c., 15 Am. & R. Cas. 306.

ligence, if the plaintiff himself is guilty of ordinary negligence contributing to the injury, he cannot recover if the negligence of the railway company or a fellow-employee is merely greater than his; for in this class of cases the plaintiff must have exercised ordinary care, and not have been guilty of ordinary negligence, to sustain his action.¹

§ 112. *Extra Territorial Effect of Statutes.*—

It is established by the weight of authority that it is not necessary that the law of the State, where the right of action accrued, and the law of the forum, where it is sought to be enforced, should concur in holding that the act done gave a right of action. The principle is generally held to be the same whether the right of action be *ex contractu* or *ex delicto*. Under this rule the rights acquired under the statutes of one State, will always, in comity, be enforced in another State if not against the public policy of the laws of the latter. But it does not follow that because the statute of one State differs from the laws of another State, that therefore it would be held contrary to the policy of the laws of the latter State. To justify a court in refusing to enforce a right of action which accrued under the law of another State, because against the policy of the laws of the State wherein the Court sits, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of the citizens of such State. A cause of action, therefore, which accrued in the State of Iowa, under a statute of that State which makes every corporation operating a railroad in that State liable for all damages sustained by its employes in consequence of the negligence of other employes of such corporation, when such wrongs are in any manner connected

1. *Kansas Pac. R. Co. v. Peavy*, R. Cas. 260. See also *McDade v. 29 Kan. 170*; s. c., 11 Am. & Eng. R. *Georgia R. Co.*, 60 Ga. 119.

with the use or operation of any railway on or about which they shall be employed, may be maintained and enforced in the State of Minnesota.¹ The Supreme Court of Wisconsin, however, have not assented to this rule.² But where the injury occurred in Texas, where the common law rule prevails, an injured servant who sues in Kansas, where there is a statutory liability imposed, cannot recover under such statute.³

§ 113. Constitutionality of Statutes.—

Most of these statutes are directed especially against railroad companies, but they are not unconstitutional on that account. They do not deprive a railroad company of its property without due process of law, do not deny to it the equal protection of the laws, and are not in conflict with the Fourteenth Amendment to the Constitution of the United States in either of these respects.⁴ On this

1. *Herrick v. Minneapolis & St. L. R. Co.*, 31 Minn. 11; s. c., 11 Am. & Eng. R. R. Cas. 256; citing *Den- nick v. Railroad Co.*, 103 U. S. 11; *Leonard v. Steam Nav. Co.*, 84 N. Y. 48; *Chicago, etc., R. Co. v. Doyle*, 60 Miss. 977; s. c., 8 Am. & Eng. R. R. Cas. 171; *Nashville & C. R. Co. v. Sprayberry*, 8 Baxt. (Tenn.) 341.

2. *Anderson v. Chicago, etc., R. Co.*, 37 Wis. 321. Concerning this case the court, in *Herrick v. Minneapolis, etc., R. Co.*, *supra*, say: "The only case which goes to the length of holding that this action cannot be maintained, is that of *Anderson v. Chicago, M. & St. P. R. Co.*, 37 Wis. 321, which, on the facts, is on all-fours with the present case, and in which the court holds that such an action will only lie in the State of Iowa, which enacted the statute. But with due deference to that court, and especially to the eminent jurist who delivered the opinion in that case, we think they entirely

failed to distinguish between the right of action, which was created by the statute of Iowa and must be governed by it, and the form of the remedy which is always governed by the law of the forum, whether the action be *ex contractu* or *ex delicto*. It is elementary that the remedy is governed by the law of the forum, and this is all that is held by any case cited by the court in support of their opinion."

3. *Atchison, etc., R. Co. v. Moore*, 29 Kan. 632; s. c., 11 Am. & Eng. R. R. Cas. 243.

4. *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205; s. c., 33 Am. & Eng. R. R. Cas. 390, sustaining the validity of the statute of Kansas of 1874, chap. 93, § 1, p. 143, Comp. Laws Kansas, 1881, p. 784; *Missouri Pac. R. Co. v. Mackey*, 33 Kan. 298; s. c., 22 Am. & Eng. R. R. Cas. 306; *Missouri Pac. R. Co. v. Haley*, 25 Kan. 35; s. c., 5 Am. & Eng. R. R. Cas. 594.

point the Supreme Court of the United States, in examining the validity of the Kansas Act, say :¹ "The only question for our examination, as the law of 1874 is presented to us in this case, is whether it is in conflict with clauses of the Fourteenth Amendment. The supposed hardship and injustice consist in imputing liability to the company, where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exist when the company without any wrong or negligence on its part, is charged for injuries to passengers. Whatever care and precaution may be taken in conducting its business or in selecting its servants, if injury happen to the passengers from the negligence or incompetency of the servants, responsibility therefor at once attaches to it. The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine, and fixes a like liability upon railroad companies, where injuries are subsequently suffered by employes, though it may be by the negligence or incompetency of a fellow-servant in the same general employment, and acting under the same immediate direction. That its passage was within the competency of the Legislature, we have no doubt.

"The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest

An objection to the Iowa statute on the same ground has been held unavailing. *Herrick v. Minneapolis & St. L. R. Co.*, 31 Minn. 11; s. c., 11 Am. & Eng. R. R. Cas. 256; *McAunich v. Mississippi & M. R. Co.*, 20 Iowa, 338; *Deppe v. Chicago, etc., R. Co.*, 36 Iowa, 52; *Bucklew v. Central Iowa R. Co.*, 64 Iowa, 603; *Rayburn v. Central Iowa R. Co.*, 74 Iowa, 637; *Pierce v. Central Iowa*

R. Co. 73 Iowa, 140.

And to the Wisconsin statute. *Ditberner v. Chicago, etc., R. Co.*, 47 Wis. 138.

And to the Georgia statute. *Georgia R. Co. v. Ivey*, 73 Ga. 499; s. c., 28 Am. & Eng. R. R. Cas. 392.

1. *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205; s. c., 33 Am. & Eng. R. R. Cas. 390.

upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be farther from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it or in the extent of its application. * * * But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employes, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the Court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage-coaches and to persons and corporations using steam in manufactories."

§ 114. Contracts in Contravention of Statute.—

The statutes of Iowa, Wisconsin, and Wyoming specially invalidate any contract releasing the company's liability. Before the adoption of the Employers' Liability Act in Massachusetts there existed the following provision prohibition of the limiting, by contract, of the employer's common law liability: "No person or corporation shall, by special contract with persons in its employ, exempt him or itself from any liability which he or it might otherwise be under to such persons, for injuries suffered by them in their employment, and which result from the employer's own negligence or from the negligence of other persons in his or its employ."¹ It may be presumed that this provision is

1. Pub. Stats. chap. 74, p. 1422.

still effective. Independent of such statutory inhibitions, however, the authorities are conflicting. In England it is the law that it is competent for a workman to contract with his employer not to claim compensation for personal injuries under the Employers' Liability Act; that the statute only affects the contract of service so far as to negative the implication of an agreement by the workman to bear the risks of the employment, and therefore does not render the employee's express contract not to claim compensation invalid. It is also held that such a contract is not against public policy, and that an employee's widow, suing for damages under Lord Campbell's Act, is bound by it.¹ In Kansas, however, it has been ruled that a railroad company cannot contract in advance with its employees for the waiver and release of the statutory liability imposed upon it; and a contract in contravention of such a statute is void and no defense to an action brought by an employee of a railroad company for damages done to him in consequence of the negligence or mismanagement of a co-employee.² This decision is placed upon the ground that as the Legislature had satisfactory reasons for changing the rule of the common law, and having adopted the statute for wise and beneficial purposes, a railroad company cannot contract in advance for a release of the statutory liability, for the reason that it would be against public policy for the courts to sanction contracts made in advance for the release of this liability, especially when the unequal situation of the servant and his employer is considered. This is certainly good reasoning. "Take this illustration," said the Court: "in some States—and in our own—the owners of coal mines which are worked by means of shafts are required to make and construct escape-

1. *Griffiths v. Earl of Dudley*, L. R. Cas. 260; s. c., 44 Am. Rep. 630. R. 13, Q. B. Div. 537. See also *Union Pac. R. Co. v. Harris*, 33 Kan. 416; s. c., 21 Am. & Eng. R. R. Cas. 584.

2. *Kansas Pac. R. Co. v. Peavy*, 29 Kan. 170; s. c., 11 Am. & Eng. R. R. Cas. 584.

ment shafts in each mine, for distinct means of ingress and egress for all persons employed or permitted to work in the mines. Such a statute is for the benefit of employes engaged in working in coal mines ; but the owner of such a mine would not be permitted to contract in advance with employes for operation of the mine in contravention of the provisions of the statute. The State has such an interest in the lives and limbs of its citizens that it has the power to enact statutes for their protection, and the provisions of such statutes are not to be evaded or waived by contracts in contravention therewith. The general principle deduced from the authorities is that an individual shall not be assisted by the law in enforcing a contract founded upon a breach or violation on his part of its principles or enactments ; and this principle is applicable to legislative enactments, and is uniformly true in regard to all statutes made to carry out measures of general policy ; and the rule holds equally good, if there be no express provision in the statute peremptorily declaring all contracts in violation of its provisions void, in regard to statutes intended generally to protect the public interests, or to vindicate public morals."

But in Georgia the English rule is followed. It has been decided that an express stipulation in a contract of service, such as between a railroad company and a brakeman, that the servant takes all risk incident to his employment, and will not hold his employer liable for injury sustained through negligence, etc., of a fellow-servant, is valid (with the limitation that no one can protect himself, by stipulation, from the consequences of criminal negligence), and will be enforced as a bar to an action for damages for an injury sustained through negligence.¹

1. *Western, etc., R. Co. v. Bishop*, 50 Ga. 465.

§ 115. *Character of the Legislation.*—

After examining these Acts it cannot escape notice that there has been a great deal too much judicial legislation ; that the Legislatures have not completed their work, but have left entirely too much for the courts. Following upon this we observe that the courts have, in several instances, at least, been imbued with too much of a legislative spirit. They have not shrunk from asking, what is politic and what is expedient ? This leads directly to the assurance that a mere abrogation of the doctrine of co-service is not a settlement of the question. Yet there can be no doubt that if the common law doctrine is obnoxious it is far better that the Legislature should abrogate that doctrine or define its limitations, than that the courts, by strained construction, should endeavor to lessen its effectiveness. It is also the writer's belief that the law-makers of the several States have made a serious mistake in confining the reform legislation to the employes of railway companies. Surely there are other employments as dangerous. Besides, while not coming within constitutional prohibitions against class legislation, it is not creditable to have it savor so much of it. The large majority of the decisions appearing in the Law Reports construing the English Act have concerned employes not connected with railway companies. It is not erroneous to infer from this that relief was needed as much by other classes of employes as it was by those connected with railways.

CHAPTER VIII.

PLEADING AND PRACTICE.

- § 116. Complaint Charging Negligence on Master.
- 117. Complaint must State Facts to Show Master's Liability.
- 118. Evidence must Show that Injury Occurred in Manner Stated.
- 119. Special Findings.

§ 116. Complaint Charging Negligence on Master.—

A complaint against an employer for damages to the person of an employe, charging the negligence by which the plaintiff was injured directly upon the defendant, and not merely upon its employes, is sufficient on demurrer ; and proof may be given thereunder of any acts or circumstances of negligence on the part of such employer, in causing the injury. This has been held to be the rule in Indiana,¹ where the complaint charged a railroad company with negligence in running a locomotive whereby the plaintiff was injured. "There is no hardship in this rule of pleading," say the Court. "Carelessness and negligence in running the locomotive were directly imputed to the defendant, whereby the plaintiff was injured ; and if the defendant had desired a more specific statement of the negligence imputed to it, that end could have been attained by motion. The mere negligence of the co-employe with the plaintiff, engaged in the same general undertaking, could not be said to be the negligence of the de-

1. *Ohio & M. R. Co. v. Collarn*, R. Cas. 554-73 Ind. 261 ; s. c., 5 Am. & Eng. R

fendant. But the defendant may have been guilty of negligence in knowingly running the locomotive by the agency of careless or incompetent persons. The language of the paragraph is broad enough to admit evidence of this kind. It was said, in the case above cited from 47 Ind. 399, that 'these are direct charges of negligence against the defendant itself, and are not confined to the negligence of its servants in killing a co-servant, and are broad enough to admit evidence of all kinds and grades of negligence on the part of the defendant.' Indeed, in holding the paragraph good on demurrer, it is necessarily assumed that under its general allegations proof may be given of any acts or circumstances of negligence on the part of the defendant in running the locomotive."

But in an action for damages for negligently causing the death of an employe, if the complaint alleges that the acts and omissions constituting the negligence were done or omitted by the defendant itself, as employer, the Court cannot presume that they were those of a fellow-employe of the deceased; and consequently the question of the liability of a common employer, for a co-employe's negligence, cannot arise on demurrer to the complaint.¹

§ 117. Complaint must State Facts to Show Master's Liability.—

A complaint by a servant against his master, for personal injuries caused by the negligence of another, must state facts to show the master's liability. The allegations in a complaint were stated as follows: "That defendants are partners, engaged in the operation and running of a certain saw-mill; that in the year 1880 the plaintiff was in the employ of the defendants, engaged in and about the hauling of logs in and about said mill; and while so engaged in his said employment, and without any carelessness on his part, a certain employe of the defendants, not

1. *Brown v. Central Pac. R. Co.*, 68 Cal. 171.

engaged in the same line of employment as the plaintiff, carelessly and negligently rolled and permitted a certain log, then in said mill, to roll against and upon this plaintiff with such force and violence that the plaintiff was bruised," etc. The Supreme Court of Indiana¹ held that these averments were insufficient, saying: "It is not alleged that the defendants were guilty of negligence; it is sought to hold them responsible for the negligence of another, and the only averment to connect them with that other is that he was their employe. In what work or agency he was employed is not alleged. If it is to be inferred that he was employed in and about the handling of logs in the mill of the defendants, it inevitably follows that he was in the same line of employment as the appellee; that is to say, was his fellow-servant; and the defendants are not responsible for the consequences to the appellee of his negligence."

§ 118. Evidence must Show that Injury Occurred in Manner Stated.

Thus, where in an action, under the Iowa statute, by a servant against the master, for injuries resulting from the negligence of co-servants, the petition stated that the injury occurred in a particular way. It was held that a request to charge that to entitle plaintiff to recover they should be satisfied that the injury occurred in the manner stated in the petition, should have been given. "The instructions given were general. The one asked directed

1. *Helfrich v. Williams*, 84 Ind. 553.

In an action against a railroad company for the alleged negligent killing of an engineer in defendant's employ, by decedent's engine colliding with another in the yard, a complaint which avers that engineers were authorized by a rule of the company to move their engines only on the signal of the "helpers," and

that decedent saw the "helper" of the other engine, who gave no signal, but that the other engine was moved in obedience to a signal of the "master mechanic, having sole control of the yard," is demurrable, as not showing that such master mechanic occupied a position rendering defendant liable for his negligence. *Mealman v. Union Pac. R. Co.*, 37 Fed. Rep. 189.

the attention of the jury to the specific matters upon which the plaintiff's right to recover was based in the pleadings. It should have been given."¹

§ 119. Special Findings.—

Where an employe sues a railroad company for the alleged negligence of his co-employe, under a statute giving him a right of action in such cases, and special questions with reference to facts tending to show the negligence of such co-employe are submitted to the jury, and the Court instructs the jury that if there is no sufficient evidence to warrant a finding upon any of these special questions, the jury may answer "Don't know," and the jury answer some of the special questions upon this subject in that manner, it has been held that as the burden of proving the negligence of such co-employe rests upon the plaintiff, the answers "Don't know" to such questions are favorable to the railroad company, and not to the plaintiff, although the jury may have intended them otherwise.²

1. *Manuel v. Chicago, etc., R. Co.*, 56 Iowa, 655; *s. c.*, 5 *Am. & Eng. R. R. Cas.* 588. 2. *Kansas Pac. R. Co. v. Peavy*, 34 *Kan.* 474.

CHAPTER IX.

WHO ARE AND WHO ARE NOT FELLOW-SERVANTS—RAILROAD EMPLOYEES.

- § 120. Purposes of Chapter.
- 121. Agents of Railroad Companies.
- 122. Baggage-Master.
- 123. Boiler-Makers and Repairers.
- 124. Brakemen.
- 125. Brake Repairers.
- 126. Bridge Builders.
- 127. Car-Inspectors and Repairers.
- 128. Conductors.
- 129. Engineers.
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- 133. General Manager or Superintendent.
- 134. Master Mechanic.
- 135. Road-Master.
- 136. Section-Boss or Section Foreman.
- 137. Station Agents and Masters.
- 138. Switchman.
- 139. Trackmen, Track Repairers, and Track Walkers.
- 140. Train Dispatcher.
- 141. Train Hands.
- 142. Yard Hands and Yard-Master.
- 143. Other Railroad Employees.

§ 120. Purposes of Chapter.—

Although, as we have seen, the rank or station of an

employe has very little to do in determining whether his negligence in a certain case, whereby another employe is injured, is chargeable to the master, yet, as the functions and duties of employes occupying certain positions in many large industrial enterprises, are clearly defined and well understood, the statement that an employe occupying one of such positions was negligent and thereby another servant of the same master was injured, renders it possible to apply the true criterion by looking at the duties which employes occupying that position are accustomed to perform, and out of the negligent performance of which the injury complained of must have arisen. To illustrate, if it is said that a brakeman and a signalman employed by the same railroad company are fellow-servants, and that the former cannot recover for an injury received through the negligence of the latter, while in the exercise of the duties imposed upon him, it is at once perceived that the injuries to the brakeman must have occurred through the negligent giving or not giving of some signal which should have been given under the circumstances, and that, as this is not one of the personal duties which the law imposes on the master, therefore the brakeman and the signalman are properly adjudged to be fellow-servants, and the railroad company is exempt from liability for the latter's negligence. This chapter will accordingly deal with this subject, viz.: For the negligence of what railroad employes whereby another employe is injured, is the railroad company liable?

§ 121. Agents of Railroad Companies.—

Certain employes of railroad companies cannot be better described than by the appellation of "agent." Thus the New York Central Railroad Company employed a person designated as an agent, whose duty it was to engage men for its services. The agent hired a foreman who was com-

petent and skillful at the time, but who subsequently acquired habits of intoxication, which were known to the agent. The foreman while intoxicated directed two incompetent men to erect a scaffold, which they did so unskillfully that an employe of the railroad company, who was upon it in the discharge of his duties, was injured by its falling. He brought an action against the railroad company, and the Court of Appeals held that the railroad company was chargeable with the negligence of its agent in retaining the foreman in its employ after knowledge of his incompetency.¹ It has also been held that the negligence of an agent employed by a railroad company to purchase a locomotive, is chargeable to the company, and employes using such locomotive and injured through the negligence of the agent are entitled to recover damages.²

§ 122. **Baggage-Master.**—

A baggage-master on a railroad train is usually charged with no duties which properly belong to the company. In a Colorado case³ it appeared that a railroad company, in anticipation of an attack upon its trains by robbers, provided breech-loading shot-guns and ammunition for their defense. These guns were placed by the superintendent of the company in charge of the train baggage-master, with instructions to keep the guns unloaded and wrapped up in a blanket, except when passing over that portion of the road where an attack was apprehended. Upon reaching a certain station on the road, the guns were to be unpacked and charged, ready for use; and after passing the same on the return of the train, the cartridges were to be withdrawn, and the guns again wrapped up, and, upon reaching the headquarters of the company, the package

1. *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; s. c., 10 Am. Rep. 417. See also *ante* § 94.
2. *Cumberland & P. R. Co. v. R. R. Cas.* 592.
3. *Colorado Cent. R. Co. v. Martin*, 5 Colo, 197; s. c., 17 Am. & Eng.

was to be delivered to the station baggage-master, to be kept over night, and upon the return of the train he was to replace the package. The plaintiff, a conductor on the train, who had entire command thereof, and knew of the foregoing regulations, was injured by the accidental discharge of one of the guns when the same were being replaced on the train by the station baggage-master. The court held that the injury resulted from the negligence of a fellow-servant for which the company was not liable. But in Illinois it has been held that the company is liable for the negligence of a baggage-master in allowing a trunk to fall upon and injure a car-inspector.¹ This decision, however, is the result of the application of the doctrine of consociation peculiar to the Illinois and two or three other courts.²

§ 123. **Boiler-Makers and Repairers.**—

The railroad company which places a locomotive with a defective boiler in the hands of an engineer and fireman, is certainly liable for any injury which may happen to such employes through the negligence of the boiler-makers or repairers.³ This liability arises from the duty of the company to use due care in furnishing safe and suitable machinery, and the agents or employes who are charged with this duty are not to be regarded as fellow-servants, but their neglect is to be regarded as the neglect of the master.⁴ The only question is whether the defect from which the accident arose was known, or might, by the exercise of reasonable diligence, have been known to the master or his agents. But the negligence of boiler-makers or boiler repairers cannot be considered as the negligence of the

1. *Indianapolis, etc., R. Co. v. etc., R. Co. v. Mason*, 109 Pa. St. Morganstern, 106 Ill. 216; s. c., 12 296; s. c., 58 Am. Rep. 722; *Fuller v. Am. & Eng. R. R. Cas.* 228. *Jewett*, 80 N. Y. 46; s. c., 36 Am.

2. See *ante* chap. 5.

Rep. 575.

3. *Nashville, etc., R. Co. v. Jones*, 9 Heisk. (Tenn.), 27; *Pennsylvania*,

4. See *ante* § 25 *et seq.*

company where the locomotive has not been placed in the hands of other employes for use.¹

§ 124. *Brakemen.*—

If one brakeman is injured through the negligence of another brakeman, in the performance of his ordinary avocations, the current of authority is unbroken to the effect that they are fellow-servants, and the company is not liable.² And if the negligence of a brakeman causes injury to a car-repairer, who is at work in the performance of his duty under a car standing on a repair track, the company is not liable, they being fellow-servants.³ Being directly consociated with the conductor of his train, and his subordinate in some respects, he is universally held to be his fellow-servant, in so far as his, the brakeman's, negligence causes injury to the conductor;⁴ and the same is true of the

1. *Murphy v. Boston & A. R. Co.*, 88 N. Y. 146; s. c., 8 Am. & Eng. R. R. Cas. 510, see *ante* § 26.

2. *Youll v. Sioux City, etc., R. Co.*, 66 Iowa 346; s. c., 21 Am. & Eng. R. R. Cas. 589; *Chicago, etc., R. Co. v. Rush*, 84 Ill. 570; *Hayes v. Western R. Corp.*, 3 Cush. (Mass.) 270; *Atchison, etc., R. Co. v. Plunkett*, 25 Kan. 188; s. c., 2 Am. & Eng. R. R. Cas. 127; *Besel v. New York, etc., R. Co.*, 70 N. Y. 171; *Nashville, etc., R. Co. v. Foster*, 10 Lea (Tenn.) 351; s. c., 11 Am. & Eng. R. R. Cas. 180; *Nashville, etc., R. Co. v. Wheless*, 10 Lea (Tenn.) 741; s. c., 4 Am. & Eng. R. R. Cas. 633; *Houston, etc., R. Co. v. Gilmore*, 62 Tex. 391.

3. *Besel v. New York, etc., R. Co.*, 70 N. Y. 171; *Campbell v. Pennsylvania R. Co. (Pa.)*, 24 Am. & Eng. R. R. Cas. 427. In the case last cited, the Court say: "The testimony conclusively shows that plaintiff was fully cognizant of the danger to

which he was exposed, from negligently dropping in cars on the tracks where he was from time to time at work, and the precautions that were taken to avert such danger. He was as fully aware of all this as the company itself, and knew that his safety depended on the care that was exercised by his fellow-servants."

4. *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226; *Thayer v. St. Louis, etc., R. Co.*, 22 Ind. 26; *Smith v. Potter*, 46 Mich. 258; s. c., 2 Am. & Eng. R. R. Cas. 140; *Dow v. Kansas Pac. R. Co.*, 8 Kan. 642; *Sherman v. Rochester, etc., R. Co.*, 17 N. Y. 153; 15 Barb. (N. Y.) 574; *Robinson v. Houston, etc., R. Co.*, 46 Tex. 540; *Pilkenton v. Gulf, etc., R. Co.*, 7 S. W. Rep. 805; *Atchison, etc., R. Co. v. Moore*, 29 Kan. 63; s. c., 11 Am. & Eng. R. R. Cas. 243; *Smith v. Flint, etc., R. Co.*, 46 Mich. 258; *Pease v. Chicago, etc., R. Co. (Wis.)*, 17 Am. & Eng.

engineer.¹ If he negligently misplaces a switch and causes a collision whereby a fireman is killed,² or fails to set the brakes of a train, whereby a laborer engaged in loading dirt upon such train is injured,³ or fails to give warning

R. R. Cas. 527; *Rodman v. Mich. Cent.*, etc. R. Co., 55 Mich. 57; s. c., 17 Am. & Eng. R. R. Cas. 521; *Hayes v. Western*, etc., R. Co., 3 Cush. (Mass.) 270; *Chicago*, etc., R. Co. v. Doyle, 60 Miss. 977; s. c., 8 Am. & Eng. R. R. Cas. 171; *Conner v. Chicago*, etc., R. Co., 59 Mo. 285; *Pease v. Chicago*, etc., R. Co., 61 Wis. 168; s. c., 17 Am. & Eng. R. R. Cas. 527; *Pittsburg*, etc., R. Co. v. Devinney, 17 Ohio St. 197; *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104; s. c., 80 Am. Dec. 467.

1. *Hutchinson v. New York*, etc., R. Co., 5 Ex. 343; *Bartonshill*, etc., C. Co. v. Reid, 3 Macq. 266; *Bartonshill*, etc., C. Co. v. McGuire, 3 Macq. 300; *Wilson v. Murray*, L. R. 1 App. Cas. 326; *Morgan v. Vale of Neath*, etc., R. Co., 5 B. & S. 570; s. c., L. R. 1 C. P. 291; *Charles v. Taylor*, L. R. 3 C. P. Div. 491; *Conway v. Belfast*, etc., R. Co., Ir. 9 C. L. 498; *Randall v. Baltimore*, etc., R. Co., 109 U. S. 478; s. c., 15 Am. & Eng. R. R. Cas. 243; *Keilly v. Belcher*, etc., M. Co., 3 Sawy. (U. S.) 500; *Jordon v. Wells*, 3 Woods (U. S.), 527; *Abell v. Western Md. R. Co.*, 63 Md. 433; s. c., 21 Am. & Eng. R. R. Cas. 503; *McAndrews v. Burns*, 39 N. J. L. 117; *Smith v. Oxford Iron Co.*, 42 N. J. L. 467; *Mann v. Delaware & H. Canal Co.*, 91 N. Y. 495; s. c., 12 Am. & Eng. R. R. Cas. 199; *Wright v. New York*, etc., R. Co., 25 N. Y. 562; *Sherman v. Rochester*, etc., R. Co., 17 N. Y. 153; *Moran v. New York*, etc., R. Co., 67 Barb. (N. Y.) 96; *Pittsburg*, etc., R. Co. v. Lewis, 33

Ohio St. 196; *Pittsburg*, etc., R. Co. v. Ranney, 37 Ohio St. 665; s. c., 5 Am. & Eng. R. R. Cas. 533; *Pittsburg*, etc., R. Co. v. Devinney, 17 Ohio St. 197; *Ponton v. Wilmington & W. R. Co.* 6 Jones (N. Car.), 245; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Nashville*, etc., R. Co. v. Wheless, 10 Lea (Tenn.), 741; s. c., 15 Am. & Eng. R. R. Cas. 315; 43 Am. Rep. 317; *East Tenn.*, etc., R. Co., v. Rush, 15 Lea (Tenn.), 145; s. c., 25 Am. & Eng. R. R. Cas. 502; *Houston*, etc., R. Co. v. Gilmore, 62 Tex. 361; *Houston*, etc., R. Co. v. Myers, 55 Tex. 110; s. c., 8 Am. & Eng. R. R. Cas. 114; *Houston*, etc., R. Co. v. Willie, 53 Tex., 318; *Hamilton v. Galveston*, etc., R. Co., 54 Tex. 556; *Kansas*, etc., R. Co. v. Peavey, 29 Kan. 169; s. c., 11 Am. & Eng. R. R. Cas. 260; *Illinois Cent. R. Co. v. Keen*, 72 Ill. 512; *St. Louis*, etc., R. Co. v. Britz, 72 Ill. 256; *Wilson v. Madison*, etc., R. Co., 18 Ind. 226; *Sloan v. Central Iowa R. Co.*, 62 Iowa, 728; s. c., 11 Am. & Eng. R. R. Cas. 145; *Summerhays v. Kansas*, etc., R. Co., 2 Colo. 484; *Jeffrey v. Keokuk*, etc., R. Co., 56 Iowa, 546; s. c., 5 Am. & Eng. R. R. Cas. 568; *Connor v. Chicago*, etc., R. Co., 59 Mo. 285; *Mobile & M. R. Co. v. Smith*, 59 Ala. 245; *Missouri Pac. R. Co. v. Texas & Pac. R. Co.*, 31 Fed. Rep. 527; *Wallis v. Morgan's La. & Tex. R. Co.*, 38 La. Am. 156.

2. *Galveston*, etc., R. Co. v. Faber (Tex.), 8 S. W. Rep. 64.

3. *Heney v. Staten Island*, etc., R. Co., 81 N. Y. 373; s. c., 2 Am. &

to a section hand on the track of the approach of a train,¹ the company is not liable. In short the usual functions of a brakeman on a railroad train do not include any of the duties which the company owes to its employees.

§ 125. Brake Repairer.—

Under the laws of Alabama a car-inspector, a brake repairer, and a brakeman are fellow-servants, and no right of action can accrue to either for an injury sustained by the negligence of any of the others.²

§ 126. Bridge Builder.—

The negligence of a bridge-builder in constructing a bridge or culvert is attributable to the railroad company, and a fireman injured by the washing out of the culvert owing to such negligence is entitled to recover damages. A single decision in Vermont, has held this to be the law,³ but the same principle has been applied in many other cases,⁴ and is undoubtedly correct. In this Vermont case Ross, J., in the course of an exceedingly able opinion, says: "The bridge-builder and road-master, while inspecting and caring for the defectively constructed culvert, were performing a duty which, as between the intestate and defendant, it was the duty of the defendant to perform. Their negligence therein was the negligence of the defendant, being the agents of the defendant for the performance of these duties; notice to them in regard to the defective construction of the stockade as affecting the safety of the culvert was notice thereof to the company." But a workman employed in the construction of a railroad bridge assumes the

Eng. R. R. Cas. 60. See also St. & Eng. R. R. Cas. 180. But see Louis, etc., R. Co. v. Britz, 72 Ill. 256. *car inspector*, § 127, *infra*.

3. Davis v. Cent. Vermont R. Co., 55 Vt. 84; s. c., 11 Am. & Eng. R. R. Cas. 173.

1. Connelly v. Minneapolis E. R. Co. 38 Minn., 80.

2. Nashville, etc., R. Co. v. Foster, 10 Lea (Tenn.), 351; s. c., 11 Am.

4. See *ante* § 29.

risks incident to the nature of the task, and the risk of any temporary oversight or mismanagement of the foreman intrusted with the general charge of the work.¹

§ 127. Car-Inspectors and Repairers.—

It is a very common thing for train hands to receive injury through the negligence of persons employed by the company to inspect their cars to discover defects and repair them. The weight of authority, perhaps, is to the effect that the negligence of such employes in the performance of such duties cannot be attributed to the company, and it is consequently not liable for it.² The ground on

1. *Yager v. Receivers*, 4 Hughes (U. S.), 192.

In the case of *Lindvall v. Woods* (Minn. 1889), 42 N. W. Rep. 1020, it appeared that defendants were engaged in grading a line of railroad. The work was done by cutting down one part, and with the material making a fill in another part adjacent. The material was conveyed from the cut to the fill in dirt-cars. In the dump these cars were run on a track laid on a temporary trestle, constructed with materials (sufficient in quality and quantity) furnished on the ground by defendants; and, as the dump was filled, this trestle was from time to time extended. Part of the men worked in the cut, others drove the teams which drew the cars, others unloaded the cars and shoveled on the dump, and another, one Johnson, framed the bents and built the trestle, but all were subject to be called, on the orders of the foreman, from one part of the work to another. A foreman, one Murdock, was in charge of the work, and gave all the orders to the men, where to work, and what to do. He also hired and discharged men on the

work. On the occasion in question it being desired to raise additional bents, and lengthen the trestle, the foreman called upon plaintiff and one Peterson to assist Johnson. While plaintiff, Peterson, and the foreman were on the trestle, attempting to shove out two stringers to reach the new bent, the trestle fell, and plaintiff was injured. The cause of the accident was that the trestle was not properly braced. *Held*, that all those engaged in the different departments of this work (including the construction of the trestle) were fellow-servants; that the trestle was not a structure furnished by the defendants for their employes to work on, but was itself a part of the construction of the road, and a part of the work which they themselves were employed to perform.

2. *Nashville, etc., R. Co. v. Foster*, 10 Lea (Tenn.), 351; s. c., 11 Am. & Eng. R. R. Cas. 180 (decided under Laws of Alabama); *Smith v. Potter*, 46 Mich. 258; s. c., 2 Am. & Eng. R. R. Cas. 140; *Mackin v. Boston, etc., R. Co.*, 135 Mass. 201; s. c., 15 Am. & Eng. R. R. Cas. 196; *Co-*

which these decisions are placed is that the railroad company's duty of inspection is performed by the employment of sufficient, competent, and suitable inspectors, who are to act under proper superintendence, rules, and instructions; and these inspectors must be deemed to be engaged in a common employment with the train men handling the cars. Such a rule, however, ignores the only true criterion of fellow-service. If the law imposes any duties at all upon the master of which he cannot relieve himself by delegating them to another, the duty of keeping machinery and instrumentalities in proper repair is one of them.¹ A car-inspector or repairer has delegated to him the duty which the railroad company impliedly contracts to perform as to its employes, viz.: of examining and inspecting the cars run upon the company's road and of pointing out and reporting any defects which he may discover in them, in order that such defects may be remedied, and the danger to the train hands, car couplers, etc., removed. He performs this duty as a representative of the company, which should in justice be made to respond for his negligence. This position has been taken by a num-

lumbus, etc., *R. Co. v. Webb*, 12 Ohio St. 475; *St. Louis, etc., R. Co. v. Rice* (Ark. 1889), 11 S. W. Rep. 699; *St. Louis, etc., R. Co. v. Gaines*, 46 Ark. 555; *Smoot v. Mobile, etc., R. Co.*, 67 Ala. 13; *Little Miami, etc., R. Co. v. Fitzpatrick*, 42 Ohio St. 318; s. c., 17 Am. & Eng. R. R. Cas. 578; *Kidwell v. Houston, etc., R. Co.*, 3 Woods (U. S.), 313. See also *Chicago, etc., R. Co. v. Bragonier*, 11 Ill. App. 516; *Wonder v. Baltimore, etc., R. Co.*, 32 Md. 411; s. c., 3 Am. Rep. 143.

A railroad company is not ordinarily liable for the negligent inspection of cars by car-inspectors, to a fellow-servant, unless it has knowledge

thereof. *Philadelphia & R. R. Co. v. Hughes*, 119 Pa. St. 301.

In *Byrnes v. New York, etc., R. Co.* (N. Y. 1889), 21 N. East Rep. 50, the New York Court of Appeals held that a railroad company which has provided a proper car for loading, and has established a system and provided competent servants for the inspection of loaded cars before they are taken out, is not liable for an injury to a servant employed on its train, caused by the improper manner in which the car is loaded, such injury being the result of the negligence of the fellow-servants of the injured person.

1. *ante* § 32.

ber of courts of high authority. The Supreme Court of Minnesota say: "The company are responsible for the negligence of the car-inspector. The duty to provide safe and suitable instrumentalities for its employes to work with is one which it cannot delegate to a servant, so as to be relieved from responsibility; and this extends to the track, and the condition of the cars and machinery upon or in connection with which they are employed."¹ The Supreme Court of Kansas has used similar language: "In this case the railway company, the master, delegated to inspectors the duty of inspecting the freight cars, which included the trucks, the drawheads, and brake-staffs thereon, to see whether everything was in order and to repair defects, if any were obvious or visible; therefore the inspectors represented the company, and were not fellow-servants of the plaintiff, who was only a brakeman."² "The mere fact," says Judge Maxey,³ "that the defendant had in its employment a competent car-inspector would not, of itself, exonerate it from liability if the brakes on the cars were defective in construction, or not in proper repair; for he was the representative of the defendant, and not a fellow-servant of plaintiff (a brakeman) in the sense contended by the defendant's counsel; and if he failed to exercise due and reasonable care in inspecting the brakes of the cars, and keeping them in proper repair, then for any negligence on his part in that respect, from which injury resulted to plaintiff, the defendant would be liable." Other courts have spoken in equally emphatic language in affirming this doctrine.⁴

1. *Fay v. Minneapolis, etc., R. Co.*, 78 Mo. 567; s. c., 17 Am. & Eng. R. 30 Minn. 231; s. c., 11 Am. & Eng. R. R. Cas. 193.

2. *Missouri Pac. R. Co. v. Dwyer*, 36 Kan. 58.

3. *Carpenter v. Mexican Nat. R. Co.*, 39 Fed. Rep. 315.

4. *Condon v. Missouri, etc., R. Co.*, 78 Mo. 567; s. c., 17 Am. & Eng. R. 30 Minn. 231; s. c., 11 Am. & Eng. R. R. Cas. 193.

R. Co., 53 Iowa, 595; s. c., 36 Am. Rep. 243; *Chicago, etc., R. Co. v. Jackson*, 55 Ill. 492; s. c., 8 Am. Rep. 661; *Tierney v. Minneapolis, etc., R. Co.*, 33 Minn. 311; s. c., 21 Am. & Eng. R. R. Cas. 545; *Macy v. St.*

The Supreme Court of Arkansas, in a recent case, makes a distinction between general inspectors of cars and appliances and mere yard inspectors. In the case of *St. Louis, etc., R. Co. v. Rice*,¹ in holding that a yard inspector whose duties are to examine all cars as soon as they arrive, and a yard foreman who is injured by the failure of the inspector to make proper examination, are fellow-servants, Judge Sandels says: "The railway company must have its repair shops to maintain its tools, rolling stock, etc., in good repair; and it must have its inspectors, not only at its *termini*, where a general overhauling is had, but at convenient stations along the line to detect such injuries

Paul, etc., R. Co., 35 Minn. 210; Chicago, etc., R. Co. v. Hoyt, 122 Ill. 369; s. c., 31 Am. & Eng. R. R. Cas. 309.

In *Cincinnati, etc., R. Co. v. McMullen* (Ind. 1889), 20 N. E. Rep. 287, it was held that a railroad company cannot avoid liabilities to a freight train conductor from a defective brake, on the ground that it was the duty of its inspector to see that the brake was in repair, and that the inspector was a co-servant of the conductor.

In *King v. Ohio, etc., R. Co.* (C. C. of Ind.), 8 Am. & Eng. R. R. Cas. 119, it was held by Gresham, J., that a car-inspector is not the fellow-servant, in common employment, of a brakeman in any such sense as to relieve the railroad company from liability for injury to the latter, caused by the defective condition of the coupling apparatus of a car which the car-inspector had failed to note. The Court say: "The master's immunity is limited to cases where the servants are engaged in the same common employment; that is to say, in the same depart-

ment of duty. Such immunity does not extend to cases where the servants are engaged in departments essentially foreign to each other. A servant cannot be held to have contemplated, in the adjustment of his wages, those dangers which arise from the carelessness of fellow-servants, without any reference whatever to the nature of their employment or duties. * * * The master is bound to protect the servant, not against all risks, but against risks which could be avoided by the exercise of reasonable care on the part of the master. The brakeman's employment exposes him to constant peril under the most favorable conditions. He is expected and required to act with dispatch in coupling and uncoupling cars; and, when he is negligently required by the proper officer or agents to handle cars out of repair, unfit for use, and dangerous, and in doing so is injured, perhaps for life, without fault on his part, he should in justice have a remedy against his employer."

1. *St. Louis, etc. R. Co. v. Rice* (Ark. 1889), 11 S. W. Rep. 700.

as may have been received *en route*. And, should such company knowingly employ and retain persons incompetent for the performance of this high service, it would be liable to the person injured, though such person were the fellow-servant of the inspector. * * * * While we recognize the liability of the railway company for the willful or negligent default of its chief inspectors, and those deputed to supervise the condemnation of unsuitable tools, rolling stock, etc., we cannot assent to the proposition that every yard inspector on the line of a railroad is a vice principal. Upon what we conceive to be the soundest principles, and the weight of authority, we hold that the appellee and the yard inspector were fellow-servants, and hence that appellee had no cause of action against the appellant." There certainly can be no force in this position. The functions of a "chief inspector" and a yard inspector differ only in degree. They both perform duties which the master has contracted with his servant shall be faithfully executed. If the master is chargeable with the negligence of one, there is not the least excuse for exempting him from liability for the default of the other.

§ 128. Conductor.—

In Kentucky,¹ Ohio,² West Virginia,³ Virginia,⁴

1. Louisville, etc., R. Co. v. Moore, 83 Ky. 675; s. c., 24 Am. & Eng. R. R. Cas. 443; Louisville, etc., R. Co. v. Brooks, 83 Ky. 129.

2. Little Miami R. Co. v. Stevens, 20 Ohio, 415; Cleveland, etc., R. Co. v. Keary, 3 Ohio St. 201; Railroad Co. v. Spangler, 44 Ohio St. 471. Compare Pittsburg, etc., R. Co. v. Devinney, 17 Ohio St. 197. Manville v. Cleveland & T. R. Co., 11 Ohio St. 417.

3. Madden v. Chesapeake & O. R. Co. 28 W. Va. 610.

4. Moon v. Richmond & A. R. Co., 78 Va. 745; s. c., 17 Am. & Eng. R. R. Cas. 531; Johnson v. Richmond, etc., R. Co. (1888), 5 S. E. Rep. 707, holding that where the evidence shows that the brakeman, who was a minor, and on his first trip, was coupling freight cars by order of the conductor, who was so situated and so far away that he could not see the opening between the cars, nor the brakeman, so as to give the proper signals to slow up, and that the brakeman was killed by the cars

South Carolina,¹ Washington,² and in the United States Supreme Court,³ the negligence of the conductor of a train causing injury to another train hand is held to be the negligence of the railroad company, and it is accordingly liable for such injury. We have already paid attention to the grounds upon which these decisions are based ;⁴ it suffices now to say that they stand isolated among the great mass of decisions, in almost every other state in the Union, opposed to them and holding that a conductor, in the performance of the functions usually delegated to such employes, although perhaps vested with a little more authority than the other train hands, yet has delegated to him none of the personal duties which the railroad company owes to its employes, and is in every way their fellow-servant.⁵ The conductor has also been

coming together with great force, negligence is proved on the part of the conductor, for which the company is liable.

In *Richmond & D. R. Co. v. Williams* (Va. 1889), 9 S. E. Rep. 990, it appeared that plaintiff, a brakeman, was ordered by the conductor of a freight train to go upon a freight car, while the train was standing, to let off a brake. The upper round of the ladder was broken, which was unknown to plaintiff, and while he was leaning out, attempting to get on the roof, the conductor signaled the engineer to back up, and, the dead-block being broken, the cars came together, and plaintiff was caught between them and crushed. *Held*, that the company was liable for the conductor's negligence.

1. *Boatwright v. Northeastern R. Co.*, 25 S. Car. 128.

2. *Northern Pac. R. Co. v. O'Brien* (Wash. 1889), 21 Pac. Rep. 32.

3. *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377 ; s. c., 17 Am. &

Eng. R. R. Cas. 501, followed in *Au v. New York, L. E. & W. R. Co.*, 29 Fed. Rep. 72 ; *Crew v. St. Louis, etc., R. Co.*, 20 Fed. Rep. 87.

4. See *ante* § 69.

5. *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226 ; *Thayer v. St. Louis, etc., R. Co.*, 22 Ind. 26 ; *Smith v. Potter*, 46 Mich. 258 ; s. c., 2 Am. & Eng. R. R. Cas. 140 ; *Dow v. Kansas Pac. R. Co.*, 8 Kan. 642 ; *Sherman v. Rochester, etc., R. Co.*, 17 N. Y. 153 ; *Slater v. Jewett*, 85 N. Y. 61 ; s. c., 5 Am. & Eng. R. R. Cas. 515 ; *Robinson v. Houston, etc., R. Co.*, 46 Tex. 540 ; *Pilkenton v. Gulf, etc., R. Co. (Tex.)*, 7 S. W. Rep. 805 ; *Atchison, etc., R. Co. v. Moore*, 29 Kan. 632 ; s. c., 11 Am. & Eng. R. R. Cas. 243 ; *Smith v. Flint, etc. R. Co.*, 46 Mich. 258 ; *Rodman v. Mich. Cent. R. Co.*, 55 Mich. 57 ; s. c., 17 Am. & Eng. R. R. Cas. 521 ; *Hayes v. Western, etc., R. Co.*, 3 Cush. (Mass.) 270 ; *Chicago, etc., R. Co. v. Doyle*, 60 Miss. 977 ; s. c., 8 Am. & Eng. R. R. Cas. 171 ; *Connor v. Chi-*

held to occupy the position of a fellow-servant of a laborer repairing the track,¹ and of laborers riding on his train,² who were injured through his negligence. Thus,

cago, etc., R. Co., 59 Mo. 285; *Pease v. Chicago, etc., R. Co.*, 61 Wis. 163; s. c., 17 Am. & Eng. R. R. Cas. 527; *Frazier v. Pennsylvania, R. Co.*, 38 Pa. St. 104; s. c., 80 Am. Dec. 467; *Dunlavy v. Chicago, etc., R. Co.*, 66 Iowa 435; s. c., 21 Am. & Eng. R. R. Cas. 542; *Whitman v. Wisconsin & M. R. Co.*, 58 Wis. 408; 12 Am. & Eng. R. R. Cas. 214; *Lawless v. Connecticut River Co.*, 136 Mass. 1; s. c., 18 Am. & Eng. R. R. Cas. 96; *Michigan, etc., R. Co. v. Dolan*, 32 Mich. 510; *Ragsdale v. Memphis, etc., R. Co.*, 59 Tenn. (3 Baxt.) 426; *Madden v. Chesapeake R. Co.* 28 W. Va. 610; s. c., 57 Am. Rep. 695; *Illinois Cent. R. Co. v. Cox*, 21 Ill. 20; s. c., 71 Am. Dec. 298; *Howland v. Milwaukee, etc., R. Co.*, 5 Am. & Eng. R. R. Cas. 578; s. c., 54 Wis. 226; *Gillshannon v. Stony Brook R. Co.*, 10 Cush. (Mass.) 228; *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291; *Morgan v. Vale of Neath R. Co.*, L. R. 1 G. B. 149; *Jeffrey v. Keokuk, etc., R. Co.* 51 Iowa, 439; 5 Am. & Eng. R. R. Cas. 568; *Cassidy v. Maine Cent. R. Co.*, 76 Me. 488; s. c., 17 Am. & Eng. R. R. Cas. 519; *Ryan v. Cumberland U. R. Co.*, 23 Pa. St. 384; *Chicago, etc., R. Co. v. McDonald*, 21 Ill. App. 409; *McGowan v. St. Louis, etc., R. Co.*, 61 Mo. 528.

The rule is not changed by the fact that the conductor is acting as engineer. *Rodman v. Michigan Cent. R. Co.*, 55 Mich. 57; s. c., 17 Am. & Eng. R. R. Cas. 521.

1. *Cumberland, etc., R. Co. v. Scally*, 27 Md. 589.

In *Heine v. Chicago & N. W. R. Co.*, 58 Wis. 525, the plaintiff, with a large number of other men, was at work for the respondent, "surfacing track"; that is, filling the dirt and gravel between the ties, and dressing up the surface. The gravel used was brought by a train of flat cars in charge of a conductor and the usual train hands. It was the duty of the men engaged in "surfacing" to get upon the cars, when the gravel train came up, and shovel off the gravel. The men engaged in "surfacing" were not otherwise connected with the train. *Held*, that the conductor of the train of flat cars was a fellow-servant of plaintiff, and that, consequently, plaintiff could not recover against the company for an injury resulting from the negligence of the conductor.

A section foreman and a train conductor are co-employees within the purview of Civil Code, Dak. § 1130, exempting an employer from liability to one of his servants for the negligence of another servant "engaged in the same general business." *Elliot v. Chicago, etc., R. Co.* (Dak.), 41 N. W. Rep. 758.

2. *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291; *Morgan v. Vale of Neath R. Co.*, L. R. 1 Q. B. 149; *Manville v. Cleveland & T. R. Co.*, 11 Ohio St. 417; *Jeffrey v. Keokuk, etc., R. Co.*, 56 Iowa, 439; 5 Am. & Eng. R. R. Cas. 568; *Fagundes v. Central Pac. R. Co.* (Cal. 1889), 21 Pac. Rep. 437; *Cassidy v. Maine Cent. R. Co.*, 76 Me. 488; s. c., 17 Am. & Eng. R. R. Cas. 519; *Ryan*

in a Massachusetts case, a common laborer on a railroad, while riding on a gravel train to his place of work, was injured by a collision caused by the negligence of the conductor in charge of the train, and it was held that no action would lie against the company.¹ Laborers loading cars cannot recover for injuries caused by the negligence of a conductor.² In North Carolina, however, it has been held that where a laborer employed by a railroad company in digging gravel under the direction of one who was engineer, superintendent, and conductor and master of the gravel and material train of defendant, and who had entire charge of that branch of the business on a section of the railroad, with power to employ and discharge hands, the laborer and such conductor and superintendent were not fellow-servants, and that he might recover of the company for an injury received through the negligence of his superior.³ In Nebraska, also, it is held that laborers employed in construction, under the orders of the conductor of a construction train, and such conductor are not fellow-servants, but that the conductor is as to such men the vice principal of the railroad company.⁴ The decisions from

v. Cumberland U. R. Co., 23 Pa. St. 384; *Chicago, etc., R. Co. v. McDonald*, 21 Ill. App. 409; *Gillshannon v. Stony Brook R. Co.*, 10 Cush. (Mass.) 228; *McGowan v. St. Louis, etc., R. Co.*, 61 Mo. 528.

Plaintiff, while going as a shoveller of snow for the defendant company upon a train engaged in the business of removing snow from the track, was injured by the overturning of the car in which he rode, by reason of an unsuccessful attempt of the conductor to remove a snow-bank from the track by means of the snow-plow alone, aided by the momentum of the train. *Held*, that a recovery by the plaintiff was precluded by the facts that such overturning of his

car was one of the perils of the business which he assumed, and that the conductor and others, whose negligence was alleged, were fellow-servants in the same employment. *Howland v. Milwaukee, etc., R. Co.*, 54 Wis. 226; s. c., 5 Am. & Eng. R. R. Cas. 578. *Compare O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239.

1. *Gillshannon v. Stony Brook R. Co.*, 10 Cush. (Mass.) 228.

2. *McGowan v. St. Louis, etc., R. Co.*, 61 Mo. 528.

3. *Dobbin v. Richmond & D. R. Co.*, 81 N. Car. 446; s. c., 31 Am. Rep. 512.

4. *Chicago, etc., R. Co. v. Swanson*, 16 Neb. 254; s. c., 49 Am. Rep.

these States, however, North Carolina and Nebraska, must be considered with reference to the superior servant limitation which their courts have adopted.¹ A surveyor riding on a train and injured through the negligence of the conductor is his fellow-servant.² But where the conductor of a train orders a boy standing by, and who was not in the employ of the railroad company, to uncouple the cars, and the boy refuses, but, on being threatened by the conductor, uncouples the cars and is injured, the two cannot be considered fellow-servants.³ In case the car-coupler is an employe of the company, however, he and the conductor are fellow-servants.⁴

§ 129. Engineers.—

If an engineer is negligent and thereby a brakeman is injured, the authorities, except in a few jurisdictions, are to the effect that they are fellow-servants and no action will lie by the brakeman against the company.⁵ This is so

718; Chicago, etc. R. Co. *v.* Lundstrom, 16 Neb. 254; s. c., 21 Am. & Eng. R. R. Cas. 528; Burlington & M. R. Co. *v.* Crockett, 19 Neb. 138; s. c., 24 Am. & Eng. R. R. Cas. 390.

1. See *ante* §§ 57 and 59.

2. Ross *v.* New York, etc., R. Co., 74 N. Y. 617.

3. New Orleans, etc., R. Co. *v.* Harrison, 48 Miss. 112.

4. Wilson *v.* Madison, etc., R. Co., 18 Ind. 226; Whitman *v.* Wisconsin & M. R. Co., 58 Wis. 408; s. c., 12 Am. & Eng. R. R. Cas. 214; Lawless *v.* Connecticut River R. Co., 136 Mass. 1; s. c., 18 Am. & Eng. R. R. Cas. 96. *Contra*, Louisville, etc., R. Co. *v.* Moore, 83 Ky. 675; s. c., 24 Am. & Eng. R. R. Cas. 443.

5. Houston, etc., R. Co. *v.* Myers, 55 Tex. 110; s. c., 8 Am. & Eng. R. R. Cas. 114; Houston, etc., R. Co. *v.* Willie, 53 Tex. 318; Houston, etc.,

R. Co. *v.* Gilmore, 62 Tex. 391; Hamilton *v.* Galveston, etc., R. Co. 54 Tex. 556; Sherman *v.* Rochester, etc., R. Co. 17 N. Y. 153; Moran *v.* New York, etc., R. Co. 67 Barb. (N. Y.) 96; Mann *v.* Delaware, etc., R. Co. 91 N. Y. 495; s. c., 12 Am. & Eng. R. R. Cas. 199; Wright *v.* New York, etc., R. Co. 25 N. Y. 562; Mobile, etc., R. Co. *v.* Smith, 59 Ala. 245; Kansas Pac. R. Co. *v.* Peavey, 29 Kan. 122; s. c., 11 Am. & Eng. R. R. Cas. 260; Jeffery *v.* Keokuk, etc., R. Co. 56 Iowa, 546; s. c., 5 Am. & Eng. R. R. Cas. 568; Sloan *v.* Central Iowa R. Co. 62 Iowa, 728; s. c., 11 Am. & Eng. R. R. Cas. 145; Lehigh V. Coal Co. *v.* Jones, 86 Pa. St. 452; Summerhays *v.* Kansas, etc., R. Co. 2 Colo. 484; Connor *v.* Chicago, etc., R. Co. 59 Mo. 285; Missouri Pac. R. Co. *v.* Texas & Pac. R. Co., 31 Fed. Rep. 527; Wallis *v.* Mor-

even in some of those states which adhere to the rule that where the master places one servant in a position of subordination to another servant, and the subordinate servant, without fault is injured through the negligence of the superior servant, the master is liable, it being held that the engineer cannot under ordinary circumstances be considered as a superior of the brakeman.¹ The duties and position of the engineer are thus discussed by the Supreme Court of Tennessee.² "The engineer is required to have superior capacity and skill in his art, to acquire which requires long service. He receives higher wages than the brakeman, and in fact higher wages than the conductor or any employe on the train. He has charge of the engine and manages and operates it, and while in motion his position is on the engine. The brakemen are not required to be men of skill, but a common laborer may, with a little practice, become

gan's La. & Tex. R. Co., 38 La. Am. 156; Nashville, etc., R. Co. v. Wheelless, 10 Lea (Tenn.) 741; s. c., 15 Am. & Eng. R. R. Cas. 315; 43 Am. Rep. 317; East Tenn., etc., R. Co. v. Rush, 15 Lea (Tenn.) 145; s. c., 25 Am. & Eng. R. R. Cas. 502; Illinois Cent. R. Co. v. Keen, 72 Ill. 512; St. Louis, etc., R. Co. v. Britz, 72 Ill. 256; Wilson v. Madison, etc., R. Co., 18 Ind. 226; Pittsburg, etc., R. Co. v. Lewis, 33 Ohio St. 196; Pittsburg, etc., R. Co. v. Ranney, 37 Ohio St. 665; s. c., 5 Am. & Eng. R. R. Cas. 533; Pittsburg, etc., R. Co. v. Devinney, 17 Ohio St. 197; Ponton v. Wilmington & W. R. Co., 6 Jones (N. Car.) 245; Randall v. Baltimore, etc., R. Co., 109 U. S. 478; s. c., 15 Am. & Eng. R. R. Cas. 243; Keilley v. Belchre, etc., R. Co., 3 Sawy. (U. S.) 500; Jordon v. Wells, 3 Woods (U. S.) 527; Abell v. Western Md. R. Co., 63 Md. 433; s. c., 21 Am. & Eng. R. R. Cas. 503; McAndrews v. Burns, 9 N. J. L. 117; Smith v. Oxford Iron Co., 42 N. J. L. 467; Hutchinson v. York, etc., R. Co., 5 Ex. 343; Bartonshill, etc., R. Co. v. Reid, 3 Macq. 266; Bartonshill, etc., R. Co. v. McGuire, 3 Macq. 300; Wilson v. Murray, L. R. 1 App. Cas. 326; Morgan v. Vale of Neath, etc., R. Co., 5 B. & S. 570; s. c., L. R. 1 C. P. 291; Charles v. Taylor, L. R. 3 C. P. Div. 491; Conway v. Belfast, etc., R. Co., Ir. 9 C. L. 498.

1. Pittsburg, etc., R. Co. v. Lewis, 33 Ohio St. 196; Pittsburg, etc., R. Co. v. Ranney, 37 Ohio St. 665; s. c., 5 Am. & Eng. R. R. Cas. 533; Pittsburg, etc., R. Co. v. Devinney, 17 Ohio St. 197; Nashville, etc., R. Co. v. Wheelless, 10 Lea (Tenn.) 741; s. c., 15 Am. & Eng. R. R. Cas. 315; East Tenn., etc., R. Co. v. Rush, 15 Lea (Tenn.) 145; s. c., 25 Am. & Eng. R. R. Cas. 502.

2. Nashville, etc., R. Co. v. Wheelless, 10 Lea (Tenn.) 741; s. c., 15 Am. & Eng. R. R. Cas. 315.

a brakeman. They are distributed along the train and it is their duty to operate the brakes, usually acting upon signals given by the engineer. They also give or communicate signals to the engineer as to moving or stopping the trains. They put off and take on freight and wood, and perform other menial services. They receive the lowest rate of wages, and in a general sense, are regarded as inferior to the engineer. The conductor has charge of the train and it moves in accordance with his orders, but in many movements the engineer and brakemen act in accordance with general regulations and a general knowledge of their duties, and without any special orders. The conductor and engineer are both said to be in charge of the train and responsible for its movements. The conductor, engineer, fireman and brakemen constitute the entire crew of a freight train. In coupling cars or making up trains the engineer acts upon signals communicated him either by the conductor or brakemen; but generally he gives no orders in regard thereto." The relation of superior and inferior may, however, exist in some cases between the engineer and the brakeman, and a railroad company has been held liable in some states, where the superior servant limitation prevails, to a brakeman for the negligence of an engineer where the former is in fact acting under the orders of the latter.¹ "The engineer and brakeman on the same train," say the Supreme Court of Kentucky,² "are not, as assumed by counsel, co-equals; for the latter has no right to resist the former, when acting in his appointed sphere, but is bound to implicitly obey his signals; and, as between them, there is no reason or consideration of policy to imply, on the part of the brakeman, an undertaking to look to the engineer alone, and not to the Company, for security against

1. *East Tennessee, etc., R. Co. v. Collins*, 85 Tenn. 227; *Cowles v. Richmond, etc., R. Co.*, 84 N. Car. 309; s. c., 2 Am. & Eng. R. R. Cas. 90.
2. *Louisville, etc., R. Co. v. Brooks*, 83 Ky. 129.

his willful neglect, even conceding such should be the rule as between co-equals. In our opinion, therefore, appellee has a right to maintain this action for the cause stated in his petition."

A brakeman working a switch for his train on one track in a railroad yard is a fellow-servant with the engineman of another train of the same corporation upon an adjacent track, and cannot maintain an action against the corporation for an injury caused by the negligence of the engineman in driving his engine too fast, and not giving due notice of its approach, without proving negligence of the corporation in employing an unfit engineman.¹ And a car-coupler, who is injured through the negligence of an engineer, has no action against the Company.² A car inspector or repairer who is injured while inspecting or repairing a car by the negligence of an engineer is a fellow-servant of such engineer and the company is not liable for the latter's negligence.³ But in a late Virginia case⁴ it was decided

1. *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478; s. c., 15 Am. & Eng. R. R. Cas. 243.

2. *Wilson v. Madison, etc., R. Co.* 18 Ind. 226; *Summerhays v. Kansas, etc., R. Co.* 2 Colo. 484; *St. Louis, etc., R. Co. v. Britz*, 72 Ill. 256; *Smith v. Potter*, 46 Mich. 258; s. c., 2 Am. & Eng. R. R. Cas. 140; *Kroy v. Chicago, etc., R. Co.*, 32 Iowa, 357; *Nashville, etc., R. Co. v. Wheless*, 10 Lea (Tenn.) 741; s. c., 4 Am. & Eng. R. R. Cas. 633; *Fowler v. Chicago, etc., R. Co. (Wis.)* 17 Am. & Eng. R. R. Cas. 536; *Hayes v. Western R. Co.*, 3 Cush. (Mass.) 270. If a railroad yard-man, whose business is not to couple cars, attempts to do so to accommodate an engineer, and is injured by the negligence of the engineer, the company is not liable. *Bradley v. Nashville, etc., R. Co.*, 14 Lea (Tenn.) 374.

Compare Louisville, etc., R. Co. v. Moore, 83 Ky. 675; s. c., 24 Am. & Eng. R. R. Cas. 443. In *Eason v. Sabine & E. T. R. Co.*, 65 Tex. 577; s. c., 57 Am. Rep. 606, the plaintiff, in the employ of persons shipping lumber by the defendant's cars, was requested by the defendant's conductor to couple a car to facilitate the loading, and was injured by the negligence of the engineer. *Held*, that the defendant was liable.

3. *Chicago, etc., R. Co. v. Murphy*, 53 Ill. 336; s. c., 5 Am. Rep. 48; *Valtez v. Ohio, etc., R. Co.*, 85 Ill. 500; *Cone v. Delaware, L. & W. R. Co.*, 81 N. Y. 207; s. c., 2 Am. & Eng. R. R. Cas. 57; *Texas, etc., R. Co. v. Harrington*, 62 Tex. 597; s. c., 21 Am. & Eng. R. R. Cas. 571.

4. *Richmond & D. R. Co. v. Norment*, (Va.) 4 S. E. Rep. 211.

that an "overhauler" of cars, who was injured through the negligence of the engineer of a shifting engine, being engaged in a different department from the engineer, was not his fellow workman in the sense which would relieve the employer from liability. And this is substantially the position taken in a recent Illinois case,¹ where a railroad company was held to be liable for the negligence of an engineer whereby a car inspector was injured. In the same state it is held that where a carpenter employed in a railroad company's shops was crossing a track on his way home from work and was struck and injured by an engine, owing to the negligence of the engineer, the company was liable, the employment of those in charge of the engine and of the carpenter being dissimilar and separate.²

A railroad company is not liable for injuries received by a conductor through the negligence of an engineer while working under his orders.³ Nor is it liable to employes

1. *Chicago & A. R. Co. v. Hoyt*, 122 Ill. 369; s. c., 31 Am. & Eng. R. R. Cas. 309. In this case it was the duty of the inspector to inspect freight cars on their arrival at the yards of the company. As soon as a train arrived the superintendent of that department directed the inspector to go upon the cars and begin the work of inspection, which he did on this occasion as soon as the train came to a full stop, and when about to step from one car to another, the engineer, without warning, suddenly started the engine with such unusual force that the train parted, and the inspector fell upon the track and was injured. The proof showed that when a freight train came to a certain place, as it did on the particular occasion, the engineer's duty in respect to the train ceased, and it was his duty to take his locomotive to the engine house, and after the in-

spection the train would be broken up by a switch engine and set apart: *Held*, that the engineer and inspector were not fellow-servants engaged in the same employment, and that the railway company was liable for the injury to the inspector, he having been found to have exercised due care. This decision is but the logical result of the Illinois doctrine of consociation. Compare, however, two former decisions closely resembling it in their facts but which were decided the other way. *Valtez v. Ohio, etc., R. Co.*, 85 Ill. 500; *Chicago, etc., R. Co. v. Murphy*, 53 Ill. 336.

2. *Ryan v. Chicago & N. W. R. Co.*, 60 Ill. 171; s. c., 14 Am. Dec. 32.

3. *Ragsdale v. Memphis, etc., R. Co.*, 59 Tenn. (3 Baxt.) 426; and see *Manville v. Cleveland & T. R. Co.*, 11 Ohio St. 417.

in the engine yard,¹ or to an engineer on a different engine belonging to it,² who are injured through the negligence of the engineer. Although in a late Kentucky case it was held that, in an action against a railroad company by an engineer of a passenger train for injuries received in a collision with a freight train, the company was liable where the accident was caused by the negligence of those in charge of the freight train.³ The fireman is the fellow-servant of the engineer so as to preclude a recovery for the latter's negligence;⁴ and the foreman of a crew of wreckers who board a train on the road where a wreck has occurred, is the fellow-servant of the engineer of the train and a colliding train, although not in the service at the time, but only on his way to work.⁵ Laborers on a construction train are not entitled to recover of the company if they are injured through the engineer's negligence;⁶ nor are laborers repairing the

1. *Texas & Pac. R. Co. v. Harrington*, 62 Tex. 597; *Keys v. Pennsylvania R. Co. (Pa.)*, 3 Atl. Rep. 15.

2. *Chicago, etc., R. Co. v. Doyle*, 60 Miss. 977; s. c., 8 Am. & Eng. R. R. Cas. 171; *VanAvery v. Union Pac. R. Co.* 35 Fed. Rep. 40.

3. *Kentucky Cent. R. Co. v. Acklerley (Ky.)*, 8 S. W. Rep. 691.

4. *Jordon v. Wells*, 3 Woods, (U. S.) 527; *Nashville, etc., R. Co. v. Handman*, 13 Lea (Tenn.), 423; *Bull v. Mobile, etc., R. Co.*, 67 Ala. 206; *Gulf, etc., R. Co. v. Blohn (Tex. 1889)*, 11 S. W. Rep. 867; *Henry v. Lake Shore, etc., R. Co.*, 49 Mich. 495; *Murry v. S. Carolina R. Co.*, 1 McMullan (S. Car.), 385; *Paulmier v. Erie R. Co.*, 34 N. J. L. 151; *Alabama, etc., R. Co. v. Waller*, 48 Ala. 459.

A fireman on a passenger train, and an engineer in charge of an engine not connected with such train, but belonging to the same railroad

company, are fellow-servants, and where the fireman is killed by a collision between the engine and the train caused by the negligence of the engineer the company will not be liable. *Howard v. Denver & R. G. R. Co.*, 26 Fed. Rep. 837; s. c., 24 Am. & Eng. R. R. Cas. 448.

5. *Abend v. Terre Haute & I. R. Co.*, 111 Ill. 202; s. c., 17 Am. & Eng. R. R. Cas. 614.

6. *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 366; s. c., 74 Am. Dec. 259; *Missouri Pac. R. Co. v. Haley*, 25 Kan. 35; s. c., 5 Am. & Eng. R. R. Cas. 594; *St. Louis, etc., R. Co. v. Schackelford*, 42 Ark. 417.

In *Chicago & A. R. Co. v. Keefe*, 47 Ill. 108, a laborer upon a construction train, at work under the orders of the conductor in charge of the train was injured in consequence of the moving of the train by the engineer, also in pursuance of the order of the conductor, but without

track,¹ nor section hands and track repairers,² nor a servant employed to put danger signals on the track,³ nor a station master,⁴ nor a switchman,⁵ nor a yard-man or a yard-master,⁶ nor an express messenger where a railroad company

giving the preliminary signal, as required by the rules. It was held that the laborer could not recover against the company.

The engineers and shovellers employed on a construction train are co-servants, engaged in the same branch of service. *St. Louis & S. R. Co. v. Britz*, 72 Ill. 256; *Chicago, etc., R. Co. v. McDonald*, 21 Ill. App. 409.

1. *Pennsylvania R. Co. v. Wachter*, 60 Md. 395; s. c., 15 Am. & Eng. R. R. Cas. 188.

2. *Gormley v. Ohio, etc., R. Co.*, 72 Ind. 31; s. c., 5 Am. & Eng. R. R. Cas. 582; *Blake v. Maine Cent. R. Co.*, 70 Me. 60; *Clifford v. Old Colony R. Co.*, 141 Mass. 564; *Houston & T. C. R. Co. v. Rider*, 62 Tex. 267; *O'Connell v. Baltimore, etc., R. Co.*, 20 Md. 212; s. c., 83 Am. Dec. 549; *Ryan v. Cumberland, etc., R. Co.*, 23 Pa. 384; *Baltimore, etc., R. Co. v. State*, 41 Md. 277; *Pennsylvania, etc., R. Co. v. Watcher*, 60 Md. 395; s. c., 15 Am. & Eng. R. R. Cas. 187; *Collins v. St. Paul, etc., R. Co.*, 30 Minn. 31; s. c., 8 Am. & Eng. R. R. Cas. 150; *Ohio, etc., R. Co. v. Collarn*, 72 Ind. 33; s. c., 38 Am. Rep. 134; *VanWickle v. Manhattan R. Co.*, 32 Fed. Rep. 278; *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 366; s. c., 74 Am. Dec. 259; *Whaalan v. Mad River, etc., R. Co.*, 8 Ohio St. 249; *Coon v. Syracuse, etc., R. Co.*, 5 N. Y. 492; *St. Louis, etc., R. Co. v. Shackelford*, 42 Ark. 417; *Sullivan v. Mississippi, etc., R. Co.*, 11 Iowa, 421; *Connelly v. Minneapolis E. R. Co.*, 38 Minn. 80.

A track repairer riding on a train is a fellow-servant of the engineer of such train through whose negligence he is injured. *White v. Kennon* (Ga. 1889), 9 S. E. Rep. 1082.

3. *East Tennessee, etc., R. Co. v. Rush*, 15 Lea (Tenn.), 145.

4. A station master to whom was given the charge and management of all the freight trains within his division, and on whom the special duty devolved of keeping the track clear of obstructions, while engaged in attending to his own personal affairs, was crossing the railway less than 80 rods from a public highway, and run over and injured by one of the trains. The engineer failed to ring the bell or sound the whistle. *Held*, that the station master was not merely an employe of the company, but, being its agent, having superintendence of the freight trains, he could not hold the company responsible for the negligence of the engineer in failing to sound the bell or whistle; that, if he was not at the time acting as such agent, he was failing in his duty, and could not make his negligence the foundation of a recovery. *Evans v. Atlantic & Pac. R. Co.*, 62 Mo. 49.

5. *Smith v. Memphis & L. R. Co.*, 18 Fed. Rep. 304; *Satterly v. Morgan*, 35 La. Ann. 1166; *Chicago, etc., R. Co. v. Henry*, 7 Ill. App. 322; *Columbia, etc., R. Co. v. Troasch*, 68 Ill. 545; *Fowler v. Chicago, etc., R. Co.*, 61 Wis. 159; s. c., 17 Am. & Eng. R. R. Cas. 536; *Naylor v. New York, etc., R. Co.*, 33 Fed. Rep. 801.

6. *Michigan Cent. R. Co. v. Gil-*

does its own express business.¹ But in the territory of Arizona it has been held that a teamster who hauls ties in the construction of a railroad is not consociated with the engine-driver of a train on which the workmen ride to dinner, so as to defeat his recovery against the common master for injuries caused by negligence of said engine-driver.²

In an Indiana case³ a workman employed by a railroad company to work in a tunnel was ordered by the superintendent of the work, under threat of dismissal, to get on a freight train for transportation to another tunnel, and in doing so he was violently cast on the ground and injured by the negligence of the engineer in starting the train. The court held that the company is not liable.

§ 180. *Engine Repairers.*—

In Pennsylvania it has been decided that where an engineer and fireman were killed by the explosion of a locomotive boiler which had been recently and insufficiently repaired in the shops of the railroad company, the company is liable, although the repairers and the deceased were under the same superintendent.⁴ Gordon, J., remarked: "Nor are those agents who are charged with the business of supplying the necessary machinery, to be regarded as fellow-servants, but rather as charged with the duty which the master owes to the servant, and the neglect of such agent is to be regarded as the neglect of the master. So is the employer equally chargeable, whether the failure is found in the original tool or machine, or in a subsequent

bert, 46 Mich. 176; s. c., 2 Am. & Eng. R. R. Cas. 230; East Tenn., etc., R. Co. v. Gurley, 12 Lea (Tenn.), 46; s. c., 17 Am. & Eng. R. R. Cas. 568; Bradley v. Nashville, etc., R. Co., 14 Lea (Tenn.), 374.

1. Baltimore & O. R. Co. v. McKenzie, 81 Va. 71; 24 Am. & Eng. R. R. Cas. 395.

2. Hobson v. New Mexico & A. R. Co. (Ariz.), 28 Am. & Eng. R. R. Cas. 360.

3. Capper v. Louisville, etc., R. Co., 103 Ind. 305; s. c., 21 Am. & Eng. R. R. Cas. 525.

4. Pennsylvania, etc., R. Co. v. Mason, 109 Pa. St. 296; s. c., 58 Am. Rep. 722.

want of repair by which it becomes dangerous. There can, indeed, be no essential difference in these particulars, and the only question is whether the defect from which the accident arose was known, or might, by the exercise of reasonable diligence, have been known to the master or his agents."¹

§ 131. Firemen.—

A fireman is one of the subordinate employees engaged in operating a railroad company's train. He is associated with, and directly under the command of the engineer; and the duties which he is called upon to perform do not include any of the personal duties which the company owes to its employees. It has accordingly been held that if a brakeman is injured through the negligence of the fireman no action will lie against the company.² And in a Wisconsin case a railroad track-walker sued the company for personal injuries by the fall of a lump of coal from a tender, on which it was carelessly piled up. The court held that he could not recover for the reason that the fireman whose negligence in piling up the coal caused the injury was the fellow-servant of the trackman.³

§ 132. Foremen.—

In a previous chapter⁴ we examined the decisions of those States which adhere to what has been denominated the "superior servant limitation," and have seen that, in most of the eight or ten States wherein it is accepted, to impute the negligence of the superior to the master he must be more than a mere foreman to oversee a number of workmen.⁵ For if it were true that when among fel-

1. See *ante*, § 32, *et seq.*

2. *Kersey v. Kansas City, etc., R. Co.*, 79 Mo. 362; s. c., 17 Am. & Eng. R. R. Cas. 638; *Greenwold v. Marquette, etc., R. Co.*, 49 Mich. 197; s. c., 8 Am. & Eng. R. R. Cas. 133; *Galveston, etc., R. Co. v. Faber*, 63 Tex.

347.

3. *Schultz v. Chicago & N. W. R. Co.*, 67 Wis. 616; s. c., 58 Am. Rep. 881.

4. Chap. IV.

5. *Ante* § 70.

low-workmen one has authority to direct and control the work of the others (as in all cases a general superintendence must be vested in some one, in order that the efforts of each may be in harmony and tend to one practical result, where many are employed), this person becomes a representative of the common master, and imposes on him a personal responsibility for his representative's misconduct or want of proper care and caution in conducting the business, the subordination necessary among numerous workmen would practically neutralize the rule itself.¹ As a foreman, then, is not, by virtue of his superiority merely, a representative of the common employer,² except in a very

1. Smith, C. J., in *Kirk v. Atlanta & C. A. R. Co.*, 94 N. Car. 625; s. c., 25 Am. & Eng. R. R. Cas. 507.

2. *Peterson v. Whitebreast, etc.*, Co., 50 Iowa, 673; s. c., 32 Am. Rep. 143; *Houser v. Chicago, etc.*, R. Co., 60 Iowa, 230; s. c., 46 Am. Rep. 65; *Hofnagle v. New York Cent. R. Co.*, 55 N. Y. 608; *Loughlin v. State*, 105 N. Y. 159; *Murphy v. Boston & Albany R. Co.*, 59 How. Pr. (N. Y.) 197; *Hanrathy v. Northern Cent. R. Co.*, 46 Md. 280; *Zeigler v. Day*, 123 Mass. 152; *Cumberland Coal & Iron Co. v. Scally*, 27 Md. 589; *Hogan v. Central Pac. R. Co.*, 49 Cal. 128; *Willis v. Oregon R. & N. Co.*, 11 Oregon, 257; s. c., 17 Am. & Eng. R. R. Cas. 559; *Brown v. Winona & St. P. R. Co.*, 27 Minn. 162; *Olson v. St. Paul, etc.*, R. Co., 38 Minn. 117; s. c., 33 Am. & Eng. R. R. Cas. 356; *Brick v. Rochester, etc.*, R. Co., 98 N. Y. 211; s. c., 21 Am. & Eng. R. R. Cas. 605; *Hart v. New York Floating Dry Dock Co.*, 48 N. Y. Super. Ct. 460; *Albro v. Agawam, etc.*, Co., 6 Cush. (Mass.) 75; *Chicago, etc.*, R. Co. v. *Simmons*, 11 Ill. App. 147; *Lawler v. Androscoggin, etc.*, R. Co., 62 Me. 463; s. c., 16 Am. Rep. 492; *Daubert v. Pickel*, 4 Mo. App. 590; *Rains v. St. Louis, etc.*, R. Co., 71 Mo. 164; s. c., 5 Am. & Eng. R. R. Cas. 610; *Barrington v. Delaware, etc.*, R. Co., 19 Hun (N. Y.) 216; *Scott v. Sweeny*, 34 Hun (N. Y.) 292; *Malone v. Hathaway*, 64 N. Y. 5; s. c., 21 Am. Rep. 570; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 433; *Weger v. Pennsylvania R. Co.*, 55 Pa. St. 460; *Keystone Bridge Co. v. Newberry*, 96 Pa. St. 246; s. c., 42 Am. Rep. 543; *Fones v. Phillips*, 39 Ark. 17; *Hoth v. Peters*, 55 Wis. 405; *Peschel v. Chicago, etc.*, R. Co., 62 Wis. 338; s. c., 17 Am. & Eng. R. R. Cas. 545; *Doughty v. Penobscot, etc.*, Co., 76 Me. 143; *Conley v. Portland R. Co.*, 78 Me. 217; *Berea, etc.*, Co. v. *Kraft*, 31 Ohio St. 287; s. c., 27 Am. Rep. 510; *Peterson v. Chicago, etc.*, R. Co. (Mich.), 34 N. W. Rep. 260; *Capper v. Louisville, etc.*, R. Co., 103 Ind. 305; s. c., 21 Am. & Eng. R. R. Cas. 525; *Indiana Car Co. v. Parker*, 100 Ind. 191; *Drinkout v. Eagle Machine Works*, 90 Ind. 423; *Brazil, etc.*, Coal Co. v. *Cain*, 98 Ind. 282; *Wright v. New York, etc.*, R. Co., 25 N. Y. 562; *Crispin v. Babbitt*, 81 N. Y. 516; s.

few jurisdictions, the cases resolve themselves into two classes: First, those holding that in order to constitute him a representative or agent of the employer he must have conferred upon him authority to take charge and control of a gang of men in carrying on some particular branch of the master's business, and to govern and direct the movements of the men under his charge with respect to that branch of business; that in such case all orders and commands given by him within the scope of his authority are, in law, the commands of the master, and the fact that he has a superior, standing between him and the company, makes no difference. Decisions affirming this principle have held that the foreman of a railroad wrecking crew is not a fellow-servant of a workman in his crew, and for an accident happening to the latter, through the negligence of the former, the company is liable;¹ that a railroad company is responsible for an injury to one of a gang of laborers in its yards, caused by the foreman negligently giving an improper command;² that the negligence of a foreman of a set of hands, whose business it was to repair freight cars while standing on the track, in failing to use reasonable care to protect one of his subordinates while under a car repairing it, was the negligence of the company, for which it was liable;³ that

- c.*, 37 Am. Rep. 521; *McDermott v. City of Boston*, 133 Mass. 349; *Flynn v. City of Salem*, 134 Mass. 351; *Beilfus v. New York, etc., R. Co.*, 29 Hun (N. Y.), 556; *Duffy v. Upton*, 113 Mass. 544; *Yager v. Atlantic, etc., R. Co.*, 4 Hughes (U. S.), 192; *Anderson v. Winston*, 31 Fed. Rep. 528; *Brown v. Winona, etc., R. Co.*, 27 Minn. 162; *s. c.*, 38 Am. Rep. 285; *McLean v. Blue Point, etc. Co.*, 51 Cal. 255; *Sioux City, etc., R. Co. v. Smith*, 22 Neb., 775; *Louisville & N. R. Co. v. Lahr* (Tenn.), 6 S. W. Rep. 663; *Stephens v. Doe*, 73 Cal. 26; *Kirk v. Atlanta & C. A. R. Co.*, 94 N. Car. 625; *s. c.*, 25 Am. & Eng. R. R. Cas. 507; *Brodeur v. Valley Falls Co. (R. I. 1889)*, 17 Atl. Rep. 54.
1. *Wabash, etc., R. Co. v. Hawk*, 121 Ill. 259; *s. c.*, 31 Am. & Eng. R. R. Cas. 306.
2. *Chicago & A. R. Co. v. May*, 108 Ill. 288; *s. c.*, 15 Am. & Eng. R. R. Cas. 320.
3. *Lake Shore, etc., R. Co. v. Lavalley*, 36 Ohio St. 221; *s. c.*, 5 Am. & Eng. R. R. Cas. 549. And see *Hannibal, etc., R. Co. v. Fox*, 31 Kan. 587; *s. c.*, 15 Am. & Eng. R. R. Cas. 325; *Luebke v. Chicago*,

the negligence of a foreman of a section gang in failing to carry out the rules of the company and protect his men while at work was the negligence of the company;¹ that a person having control of a railroad company's timber-yard, and employing and discharging men, is a vice principal, and the person upon whom the care and management of the yard devolves in his absence is to be regarded as a temporary vice-principal, and his negligence, causing injury to a yard employe, is not the negligence of a co-employe;² that "where a servant in the employ of a railroad company is injured through the negligence of a foreman, who has control and superior authority over him with respect to the business in which they are employed, and who has authority to employ and discharge men, and give directions as to their movements and their work, then such foreman is to be considered as a 'superior servant,' and the company will be held responsible for the injury";³ that "where a master employs one servant and requires him to work under the orders of another, and gives the latter power to dismiss the former at his pleasure, the latter is a superior servant or vice principal, and stands in the place of the master when acting in the scope of his powers";⁴

etc., R. Co., 59 Wis. 127; s. c., 15 Am. & Eng. R. R. Cas. 183; Moore v. Wabash, etc., R. Co., 85 Mo. 588. But compare *Fraker v. St. Paul, etc., R. Co.*, 32 Minn. 54; s. c., 15 Am. & Eng. R. R. Cas. 256; *Kirk v. Atlanta, etc., R. Co.*, 94 N. Car. 625; s. c., 25 Am. & Eng. R. R. Cas. 507.

1. *Criswell v. Pittsburg, etc., R. Co.*, 30 W. Va. 798; s. c., 33 Am. & Eng. R. R. Cas. 233.

2. *Baldwin v. St. Louis, etc., R. Co.* (Iowa, 1888), 39 N. W. Rep. 507.

3. *Smith v. Sioux City, etc., R. Co.*, 15 Neb. 583; s. c., 17 Am. & Eng. R. R. Cas. 561.

4. *Miller v. Union Pac. R. Co.* (U. S. C. C. Colo.), 17 Fed. Rep. 67.

Where a foreman of common laborers is employed in handling and moving heavy parts of machinery, having full control of them for that purpose, and hiring and discharging them subject to the approval of the superintendent of a corporation engaged in the manufacture of dynamo engines, the corporation is liable for an injury to one of the laborers who was engaged with six others in moving the bed-plate of an engine, weighing about 1,500 pounds, where the foreman called the others away, and left the plaintiff to hold it alone, when it turned over on him and broke a bone of one of his legs, and otherwise injured him. *Mason v.*

and other cases have been similarly decided.¹

The second class of cases are those which consider a foreman, as such, no more a representative of the master than are his subordinates; that his giving commands and orders which the subordinates are bound to obey is merely an incident of his supervisory power, and does not render the master liable for his negligence in exercising that power; that the negligence of a foreman of a gang as to workmen under his control is only the negligence of the master when it arises out of the performance or nonperformance of some act which the master has impliedly contracted should be performed with due care, such as the furnishing proper machinery and appliances, keeping them in repair, making and promulgating proper rules, selecting competent co-servants, etc. This is the rule adopted by the great majority of the courts of this country,² and is consistent with the criterion of fellow-service adopted in this work.³ Under this rule it has been held that to constitute a servant of a railroad company vice principal, so as to hold the company liable for his negligence toward an-

Edison Machine Works, 28 Fed. Rep. 228. *Id.* go & N. W. R. Co. v. Bayfield, 37 Mich. 205; Brabbitts v. Chicago &

1. Atlanta Cotton Factory v. N. W. R. Co., 38 Wis. 289; Kain v. Speer, 69 Ga. 137; Patton v. Western N. Car. R. Co., 96 N. Car. 455; s. c., 31 Am. & Eng. R. R. Cas. 298; Couch v. Charlotte, C. & A. R. Co., 22 S. Car. 557; s. c., 28 Am. & Eng. R. R. Cas. 331; Louisville, etc., R. Co. v. Bowles 9 Heisk (Tenn.), 866; Stephens v. Hannibal, etc., R. Co., 86 Mo. 221; s. c., 28 Am. & Eng. R. R. Cas. 538; Stephens v. Hannibal, etc., R. Co. (Mo.), 9 S. W. Rep. 589; McDermott v. Hannibal, etc., R. Co., 87 Mo. 285; s. c., 28 Am. & Eng. R. R. Cas. 528.

2. Cook v. Hannibal & St. Jo. R. Co., 63 Mo. 397; Hannibal, etc., R. Co. v. Fox, 31 Kan. 587; s. c., 15 Am. & Eng. R. R. Cas. 325; Chicago & N. W. R. Co. v. Bayfield, 37 Mich. 205; Brabbitts v. Chicago & N. W. R. Co., 38 Wis. 289; Kain v. Smith, 25 Hun (N. Y.), 146; Eagan v. Tucker, 18 Hun (N. Y.), 347; Hussey v. Cogger, 39 Hun (N. Y.), 639; Dowling v. Allen, 74 Mo. 13; s. c., 41 Am. Rep. 298; Hawkins v. Johnson, 105 Ind. 29; s. c., 55 Am. Rep. 169; Kansas, etc., R. Co. v. Little, 19 Kan. 267; Weger v. Pennsylvania, etc., R. Co., 55 Pa. St. 460; Beeson v. Green Mountain, etc., Co., 57 Cal. 20; Brown v. Sennett, 68 Cal. 225; Dowling v. Allen, 74 Mo. 13; 41 Am. Rep. 298; Mulcairns v. Janesville, 67 Wis. 24; Peschel v. Chicago, etc., R. Co., 62 Wis. 338; s. c., 17 Am. & Eng. R. R. Cas. 545; Dutz v. Geisel, 23 Mo. App. 676.

3. See *ante* § 23.

other servant, it is not sufficient to show that the duties of the former were to direct and control assistant brakemen in the service of the company at a particular yard, and that the latter was one of the assistant brakemen at that yard;¹ that the foreman of a gang of men engaged in constructing a shed, who works together with them and has no authority to throw away old scaffolding and obtain new without special orders, is a fellow-servant with other men in his gang, and the company is not responsible, accordingly, for an injury to one of these occasioned by a defect in a board taken and received by such foreman for the erection of a scaffold;² that a "road-master," is a fellow-servant of a section hand, and the latter cannot recover for the negligence of the former;³ that the negligence of the foreman of a gang engaged in repairing a railroad track in failing to see that the crossings were cleaned and kept in repair, whereby one of his subordinates was injured, was not the negligence of the company;⁴ that the foreman of a gang of section men engaged in the discharge of his ordinary duties in the course of his employment is a fellow-servant with them;⁵ that the failure of a foreman to remove a flag and place it in front of the cars upon the repair track, so as to prevent any other train from coupling on to such car while such signal was displayed, as required by a rule of the company, whereby a car repairer was injured, does not charge the company with his negligence;⁶ and that the negligence of a "gang-boss" in overseeing the lowering of an engine in the repair shops

1. *Rains v. St. Louis, etc., R. Co.*, Minn. 162.

71 Mo. 164; s. c., 5 Am. & Eng. R. R. Cas. 610.

2. *Willis v. Oregon R. & N. Co.*, 11 Ore. 257; s. c., 17 Am. & Eng. R. R. Cas. 539.

3. *Lawlor v. Androscoggin R. Co.*, 62 Me. 463; s. c., 16 Am. Rep. 492; *Brown v. Winona, etc., R. Co.*, 27

4. *Brick v. Rochester, etc., R. Co.*, 98 N. Y. 211; s. c., 21 Am. & Eng. R. R. Cas. 605.

5. *Olson v. St. Paul, etc., R. Co.*, 38 Minn. 117; s. c., 33 Am. & Eng. R. R. Cas. 386.

6. *Peterson v. Chicago, etc., R. Co. (Mich.)*, 34 N. W. Rep. 260.

of a railroad company, whereby one of his subordinates is injured, is not the negligence of the company.¹

§ 188. General Manager or Superintendent.—

The general manager or superintendent of a railroad company, clothed with the power and authority of the company's board of directors, in regard to the management of trains and all arrangements connected therewith, is the immediate representative and corporate executive officer; and his negligent or improper order, which causes an injury to an employe, renders the company liable.² The negligence of such an officer as to the company's track or appliances, whereby an employe is injured, is also the negligence of the company. Thus, a conductor employed by a railroad company notified the superintendent of the railroad of the dangerous condition of a switch thereon; the superintendent promised to repair same, but directed the conductor to use it, observing care; while carefully using it an accident was caused by the switch, and the conductor injured. It was held that notice to the superintendent was notice to the company, which was liable for the injury.³ But if the superintendent or manager has not general authority, but merely supervises a certain branch of the business, a mere foreman, he stands in the same position as a foreman. Thus, one S. was sent in charge of a wrecking train to get a car on a track. He

1. *McBride v. Union Pac. R. Co.*, (Wyo. 1889), 21 Pac. Rep. 687.

2. *Washburn v. Nashville & C. R. Co.*, 3 Head (Tenn.), 638; s. c., 75 Am. Dec. 784; *Phillips v. Chicago, etc., R. Co.*, 64 Wis. 475; s. c., 23 Am. & Eng. R. R. Cas. 453. Plaintiff, while rolling wheels down a track of defendant, so inclined that the wheels would roll of their own momentum, was injured by loose wheels rolling down behind him. *Held*, that evidence that the super-

intendent in charge had been warned by one of the men to station a man at the top to check the wheels, in order to prevent any injury of this kind, was admissible to show negligence on the part of defendant. *Savanpah, etc., R. Co. v. Goss* (Ga. 1888), 5 S. E. Rep. 777.

3. *Patterson v. Pittsburg & C. R. Co.*, 76 Pa. St. 389. *Compare Mobile, etc., R. Co. v. Smith*, 59 Ala. 245.

superintended this branch of the business of the defendant railroad company, under the orders of the person in charge of the shops and yards. S. negligently gave an improper order and a workman under his command was killed. The General Term of the New York Supreme Court held that S. and the workman were fellow-servants and the company was not liable.¹ And in the absence of evidence to show that the general traffic manager of a railway company occupies, towards the company, a position superior to that of fellow-servant with a milesman employed by the same company, they are to be taken to be fellow-servants, and the company is not liable for injuries caused to the milesman by the negligence of the traffic manager.²

§ 134. *Master Mechanic.*—

Where a railroad company have placed their engines and other machinery under the immediate charge, control, and direction of a master mechanic, and have furnished him with adequate materials and resources for their repair, his negligence in respect to such engines and machinery is the negligence of the company. He stands in their place and has delegated to him the performance of one of the primary duties which the company owes to their employes, viz.: that of overseeing and repairing machinery and appliances. It has accordingly been held that a division master mechanic is not a fellow-servant of a locomotive fireman, and a railroad company is liable for the death of the latter caused by the parting of the locomotive and the tender, owing to their difference in height, after the master mechanic had been notified of the defect.³ And a brake-

1. *Beilfus v. New York, etc., R. Co.*, 29 Hun (N. Y.), 556.
2. *Conway v. Belfast & N. C. R. Co.*, 11 Ir. R. C. L. 345.
3. *Krueger v. Louisville, N. A. & C. R. Co.*, 111 Ind. 51; s. c., 31 Am. & Eng. R. R. Cas. 329. This decision squarely overrules the case of *Columbus & I. R. Co. v. Arnold*, 31 Ind. 174, where it was held that a master machinist, who has the immediate charge, control, and direction of the engines and other machinery of a railroad company and

man injured through the negligence of a master mechanic as to machinery has an action against the company,¹ and so has an engineer.² In a Texas case³ a plumber employed in a railway company's repair shops, who was injured through the negligence of a master mechanic, was held entitled to recover.

§ 135. *Roadmaster.*—

A railway roadmaster occupies much the same position towards the company's track, roadbed, etc., as the master mechanic does towards the engines and machinery; and if a train hand is injured through the roadmaster's negligence in keeping the track in proper condition, an action will lie against the company.⁴ "A railroad company is liable," say the Supreme Court of Kansas,⁵ "to any one of its servants operating its road for the negligence of any other one of its servants whose duty it was to keep the road in good condition, and who culpably failed to perform such duty, or to give proper warning; for in such case the two classes of servants would not be fellow-servants or co-employees,

the repairs thereof, and the control and direction of the engineers and firemen on the trains, is a fellow-servant of such a fireman. It is a curious fact, however, that the opinion in the Krueger case, *supra*, makes no mention of this case, although the opinion in both cases was written by the same judge. But in *Indiana Car Co. v. Parker*, 100 Ind. 181, the Court say that the Arnold case is an extreme one, and "perhaps (!) carries the doctrine beyond its limits."

1. *Gottlieb v. New York, etc., R. Co.*, 100 N. Y. 462; s. c., 24 Am. & Eng. R. R. Cas. 421; *Cooper v. Pittsburgh, etc., R. Co.*, 24 W. Va. 37.

2. *Hough v. Texas & Pac. R. Co.*, 100 U. S. 213; *Ford v. Fitchburg*

R. Co., 110 Mass. 240; s. c., 14 Am. Rep. 598. The case of *Hard v. Vermont Cent. R. Co.*, 32 Vt. 473, announces a different rule, but this decision was practically overruled in *Davis v. Central Vermont R. Co.*, 55 Vt. 84; s. c., 11 Am. & Eng. R. R. Cas. 173.

3. *Douglas v. Texas-Mexican R. Co.* 63 Tex. 564.

4. *Houston, etc., R. Co. v. Dunham*, 49 Tex. 181; *Atchison etc., R. Co. v. Moore*, 29 Kan. 632; s. c., 11 Am. & Eng. R. R. Cas. 243; *Davis v. Cent. Vermont R. Co.*, 55 Vt. 84. Compare *Mobile, etc., R. Co. v. Smith*, 59 Ala. 245.

5. *Atchison, etc., R. Co. v. Moore*, 29 Kan. 632; s. c., 11 Am. & Eng. R. R. Cas. 243.

but the latter class would really be the representative of the master, the representative of the railroad company ; and the failure of the servant would be within the line of his duty."¹ But the mere negligence of a roadmaster in misplacing a switch will not render the company liable to any engineer and fireman who are injured thereby.² And where the roadmaster assumes to act as a mere "boss" or foreman of a gang, and one of the laborers under his control is injured, they are fellow-servants.³ But a railroad company has been held liable for damages to an employe who, in assisting to get a car off the track, was injured by the breaking of an old worn rope used by the direction of the roadmaster superintending the job.⁴

§ 136. Section Boss or Section Hand.—

A section boss in charge of a squad of hands, working, altering and repairing the road, or one of his subordinates, can in no sense be regarded as a fellow-servant of employes operating trains over the road so as to exempt the company from liability for their negligence in leaving the track defective. The company delegates to these employes the

1. See *ante* § 29.

2. Through the negligence of a competent roadmaster of a railroad corporation a switch was misplaced, and a locomotive engine and a train of cars were turned upon a side track, the sleepers of which were rotten; the engine and train were thrown from the track, and the engineer and fireman of the engine were injured. *Held*, that they were fellow-servants with the roadmaster and could not maintain an action against the corporation. *Walker v. Boston & M. R. Co.*, 128 Mass. 8; s. c., 1 Am. & Eng. R. R. Cas. 141.

3. *Lawlor v. Androscoggin R. Co.*, 62 Me. 463; *Brown v. Winona, etc., R. Co.*, 27 Minn. 162; s. c., 38 Am.

Rep. 285.

In *Hoke v. St. Louis, etc., R. Co.*, 88 Mo. 360 (reversing s. c., 11 Mo. App. 574), a different conclusion apparently is reached. There a roadmaster of a railroad, having general superintendence of its track, while engaged in superintending and directing the removal of a wrecked train, but not in the manual work of removing a wreck, gave a wrong signal to the engineer of a train assisting in removing the wreck, whereby a laborer engaged in the work of removal is injured. It was held (erroneously, it is believed) that the company was liable.

4. *Galveston, etc., R. Co. v. Delahunty*, 53 Tex. 206.

performance of a duty which the law makes it incumbent on the company to perform, *i. e.*, that of furnishing a reasonably safe track and roadbed and keeping it in repair, and it is liable for the negligent performance of this duty.¹ A section-boss and a section-hand are usually considered fellow-servants,² but on this point the decisions are conflicting.³

§ 137. Station Agents and Masters.—

The position occupied by a station agent and the responsibility of the company for his negligence are clearly stated by the Supreme Court of Minnesota.⁴ Berry, J., says: "In the absence of controlling evidence to the contrary, an ordinary railway station agent is to be taken as having general charge of the tracks at and about his station. This

1. *Hullehan v. Green Bay, etc., R. Co.*, 68 Wis. 520; s. c., 31 Am. & Eng. R. R. Cas. 322; *Shanny v. Androscoggin Mills Co.*, 66 Me. 420; *Lewis v. St. Louis, etc., R. Co.*, 59 Mo. 495; s. c., 21 Am. Rep. 385; *Houston, etc., R. Co. v. Dunham*, 49 Tex. 181; *Moon v. Richmond & A. R. Co.*, 78 Va. 745; s. c., 17 Am. & Eng. R. R. Cas. 531; *Vautrain v. St. Louis, etc., R. Co.*, 8 Mo. App. 538; *Calvo v. Charlotte, C. & A. R. Co.*, 23 S. Car. 526; s. c., 28 Am. & Eng. R. R. Cas. 327; *St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 412; s. c., 28 Am. & Eng. R. R. Cas. 341. And see *Chicago, etc., R. Co. v. Moranda*, 108 Ill. 576; s. c., 17 Am. & Eng. R. R. Cas., 564; *Baltimore, etc., R. Co. v. McKenzie*, 81 Va. 71; s. c., 24 Am. & Eng. R. R. Cas. 395; *Thompson v. Drymala*, 26 Minn. 40. *Compare, Mobile, etc., R. Co. v. Smith*, 59 Ala. 245. See *ante* § 29.
2. *Clifford v. Old Colony R. Co.*, 141 Mass. 564; *Little Rock, etc., R. Co. v. Duffy*, 35 Ark. 602; s. c., 4 Am. & Eng. R. R. Cas. 637; *Olson v. St. Paul, etc., R. Co.*, 38 Minn. 117; s. c., 33 Am. & Eng. R. R. Cas. 356; *Barringer v. Delaware, etc., Canal Co.*, 19 Hun. (N. Y.), 216. *Compare, International, etc., R. Co. v. Hester*, 64 Tex. 401; s. c., 21 Am. & Eng. R. R. Cas. 535; *Patton v. Western N. Car. R. Co.*, 96 N. Car. 455; *McDermott v. Hannibal, etc., R. Co.*, 87 Mo. 285; s. c., 28 Am. & Eng. R. R. Cas. 529; *Clowers v. Wabash, etc., R. Co.*, 21 Mo. App. 213.
3. See *ante* § 132 "*Foreman.*"
4. *Brown v. Minneapolis & St. L. R. Co.*, 31 Minn. 553; s. c., 15 Am. & Eng. R. R. Cas. 333.

A section-foreman whose duty it is to keep the track in repair and free from obstructions, in this par-

is a reasonable presumption of fact, founded upon the ordinary course of business, the common understanding of the public, and the nature and necessities of the case. Of course, the station agent is always subject to the control of his superiors, and his general charge may be limited by rules and regulations; as, in this instance, by the prohibition to place cars upon the main track to load or unbad without permission from the train master, or by the assignment of some portion of what would ordinarily be his duties to some other person. The presumption spoken of appears to be supported by the rule put in evidence. As a consequence of these views it is clear that, upon the facts before stated, it was the duty of the station agent, as respects the plaintiff,¹ to see that the main track was unobstructed and ready for his train, and that, in suffering it to be obstructed as it was, the agent was guilty of negligence through which plaintiff was injured. As respects the defendant, this negligence of the station agent is the only negligence of which plaintiff can or does complain. In this state of facts the trial court dismissed the action, being of opinion that the station agent was plaintiff's fellow-servant, and that, therefore, no charge of incompetency being made against him, the plaintiff cannot recover for the injuries resulting from his negligence. * * * Applying the rule that, the facts being undisputed, the relation of the station master to the plaintiff is a question of law, in our opinion the station master in this case does not fall within the exception to the rule making him *prima facie* plaintiff's fellow-servant. Here there was no neglect to furnish or maintain suitable instrumentalities for the performance of plaintiff's proper service; and herein the case differs essentially from *Drymala v. Thompson*,² relied upon by plaintiff. There the track itself was defective. Here no complaint is made that the track itself was improperly

1. An engineer.

2. 26 Minn. 40.

constructed or in bad order. But the complaint, in effect, is that a proper track was improperly used, or attended to by the station agent. A master is not, by reason of any absolute or personal duty on his part, liable to one employe for the improper use of proper instrumentalities by another.¹ Any other doctrine would obviously lead to most astonishing consequences. Neither is the station agent's case that of an officer exercising general control or management of the defendant's business, or a branch thereof. He is simply charged with special duties as to his station, as a switchman sometime is as to a particular switch, or an engineer to a particular engine. His duty is simply that of an operative."

This is the position taken by other authorities where the *status* of the station agent has come into question. Thus, a brakeman jumped upon a moving train, and while climbing up the ladder on the side of the car was struck by a pile of lumber near the track, which was unloaded and piled there by the direction of the station agent. In an action against the company for damages, the Supreme Court of Rhode Island² held that the station agent was the brakeman's fellow-servant who was not entitled to recover for the former's negligence. And, though by the rules of a railroad company its station agent is held responsible for the safety of switches, and is expressly required to see that the main track is kept clear and unobstructed for the passage of trains, and to be out at the station and know that everything is right when trains are passing, yet such station agent has been held to be a fellow-servant of a brakeman on a train of the company passing his station, and the company is not liable to such brakeman for inju-

1. Citing, *Floyd v. Sugden*, 134 27 Minn. 162; *Heine v. Chicago, etc.*, Mass. 563; *Summersell v. Fish*, 117 R. Co. 58 Wis. 525.
 Mass. 312; *Griffiths v. Gidlow*, 3 H. 2. *Gaffney v. New York & N. E.*
 & N. 648; *Gibson v. Pacific R. Co.*, R. Co., 15 R. I. 456; s. c., 31 Am. &
 46 Mo. 163; *Wood, M. & Serv.* § 371; Eng. R. R. Cas. 265.
Brown v. Winona & St. P. R. Co.,

ries from a collision near such station caused by the negligence of the agent.¹

The position taken by these cases, is, it is believed, erroneous. If there is anything well established about the law of fellow-servants as far as it concerns railroad companies, it is that negligence in keeping the company's track and roadbed in a safe condition and suitable for the passage of trains, is negligence, which, as between the company and an employe injured thereby, is chargeable upon the company.² This rule has been applied almost without exception where roadmasters, section-hands, track-repairers, etc., have been derelict in the performance of their duties, and in consequence of which some train-hand has been killed or injured.³ If a station agent is charged with this duty of the company of seeing that the tracks and switches around the station are in a safe condition, is there any good and sufficient reason why the same rule should not be applied in case of his negligence in this respect? A track is just as much a defective and just as dangerous for the passage of trains if a car is standing where it ought not to stand and where it is not expected, as if the ties were rotten or the rails loose, or a rock or other obstruction is left upon the track, and a railroad company should be held liable in the one case as well as in the other.⁴

1. *Toner v. Chicago, etc., R. Co.*, 69 Wis. 188.

2. *Ante* § 29.

3. *Ante* §§ 29, 135, 136; *infra* § 139.

4. These observations are supported by the dissenting opinion of Taylor, J., in the case of *Toner v. Chicago, etc., R. Co.*, 69 Wis. 188. He said: "The proposition is not disputed, but it is insisted that permitting a car to obstruct a track is not such a defect in the road as to fix negligence on the company if not removed. If it be the duty of the company to maintain a safe track for its employes who run its trains, can it make any difference whether a rock, a tree, or a broken bridge, a broken rail, or a structure maintained too near the track, or a railroad car driven upon the track by the force of the winds, causes the dangerous condition of the road? In either case it becomes the duty of the company to remove the obstruction or repair the track as soon as it can be ascertained by the exercise of reasonable diligence. And in such case the knowledge of the agent of the company, whose duty

A railroad company, however, has been held liable for the negligence of a station agent who performs the duties of a train dispatcher.¹ But a brakeman cannot maintain an action against the corporation for personal injuries caused by the making up of a train of cars, with platforms of unequal height, by the ordinary servants of the company under the direction of one of its station masters.² And where, by reason of the negligence of a station master in the employ of a railroad, in not delivering a telegram to the en-

it is to see that the track is in order, is the knowledge of the company, and any neglect on his part is the neglect of the company.

"This is not a case where the defect in the track results from necessary work being done in repairing the track. In such cases it becomes necessary to render the track somewhat unsafe while the repairs are going on, and it may well be said in such case, that it has done its whole duty to its employees. This is a case where the forces of nature have impaired the safety of the road. Against defects caused by these forces the company is bound to protect its employees by the exercise of due diligence in discovering the defects and guarding against them. That when the track becomes unsafe by the operation of natural forces there can be no doubt as to the duty of the company to use diligence in ascertaining the fact, and remedying it, and any neglect to do so is the neglect of the company, there would seem to be no doubt. All the cases hold this, and the point was decided against the company in the case of *Stetler v. C. & N. W. R. Co.*, 46 Wis. 499; s. c., 49 Wis. 609. It seems to me too clear almost for argument that if a railroad company suffered

its track to remain out of repair and unsafe after a freshet, which had weakened its bridges or washed away its embankments, after it could have learned of the fact by reasonable diligence, it would be liable to an employe operating a train on such road, unless it was the duty of the employe injured to see that the road was in a safe condition. The company, being under obligation to keep its road in a safe condition, is not relieved from its liability because of the neglect of its agents charged with that duty. The neglect of such agents is the neglect of the company in such case. It seems to me that it can make no difference that the track is rendered unsafe by the fact that a defect which renders the road unsafe arises from the fact that some object is blown upon the track, or whether the supports of the track are destroyed by the force of the winds or floods."

1. *Palmer v. Utah & N. R. Co.* (Idaho), 13 Pac. Rep. 425; an employe killed in an accident caused by defective track of which the agent had notice but failed to notify the conductor of the train.

2. *Hodgkins v. Eastern R. Co.*, 119 Mass. 419.

gineer of a passenger train having the right of way, notifying him that a switch was open, by means of which he must cross from one track to another to get around a freight train on the same track, and cautioning him as to the rate of speed, the engine was thrown from the track at the switch and the engineer killed, it was held that the injury was occasioned by the negligence of a co-employee, and no action could be maintained.¹

§ 138. *Switchman.*

In a Minnesota case, *Roberts v. Chicago, etc., R. Co.*,² a train ran off the track in consequence of a misplaced switch, negligently left open by a switchman, thereby causing the death of a baggage master on the train. The court held that the switch-tender and baggage master were fellow-servants within the rule exempting the company from liability. And this is the general rule; the co-operation of the switchman is necessary to the successful management of the trains, and employes upon the train, in the common service, assume the risk of the negligent discharge of his duty.³

1. *Dealey v. Philadelphia, etc., R. Co. (Pa.)*, 4 Atl. Rep. 170.
2. 33 Minn. 218.
3. *Roberts v. Chicago, etc., R. Co.*, 33 Minn. 218; *Slatterly v. Toledo, etc., R. Co.*, 23 Ind. 81; *Robertson v. Terre Haute, etc., R. Co.*, 78 Ind. 79; s. c., 8 Am. & Eng. R. R. Cas. 175; *Tinney v. Boston, etc., R. Co.*, 52 N. Y. 632; *Harvey v. New York, etc., R. Co.*, 88 N. Y. 481; s. c., 8 Am. & Eng. R. R. Cas. 515; *Gibson v. Northern, etc., R. Co.*, 22 Hun (N. Y.), 289; *Gilman v. Eastern R. Co.*, 10 Allen (Mass.), 233; s. c., 87 Am. Dec. 635; *Brown v. Central Pac. R. Co.*, 68 Cal., 171; *Farwell v. Boston, etc., R. Co.*, 4 Metc. (Mass.) 49; s. c., 38 Am. Dec. 339; *Bartons-hill, etc., R. Co. v. Reid*, 3 McQ. (H. of L.) 266; *Smith v. Memphis & L. R. Co.*, 18 Fed. Rep. 304; *Satterly v. Morgan*, 35 La. Ann. 1166; *Chicago, etc., R. Co. v. Henry*, 7 Ill. App. 322; *Columbus, etc., R. Co. v. Troesch*, 68 Ill. 545; *East Tenn., etc., R. Co. v. Gurley*, 12 Lea (Tenn.), 46; s. c., 17 Am. & Eng. R. R. Cas. 568; *Fowler v. Chicago, etc., R. Co.*, 61 Wis., 159; 17 Am. & Eng. R. R. 536; *Naylor v. New York Cent. R. Co.*, 33 Fed. Rep. 801; *Harvey v. New York, etc., R. Co.*, 88 N. Y. 481; s. c., 8 Am. & Eng. R. R. Cas. 515; *Tinney v. Boston, etc., R. Co.*, 62 Barb. (N. Y.) 218. But a switch tender, employed by a railroad company on a portion of its track upon which it permits another company to run trains, is not a servant of the

§ 139. Track-men, Track-repairers and Track-walkers.

The fact that a track-man is under the supervision of a roadmaster, and he in turn is under the supervision of the general superintendent, does not alter the nature of the duty which he is employed to do, viz.: to keep the track in order, so as to insure, as far as practicable, the safety of the trains continually passing over it. The question is as to the nature of the duty, not as to the rank or grade of the person employed to perform it. Is it a duty which the master owes to his servants? Nothing can be clearer than that it is the duty of a railroad company to provide a suitable and safe track over which its locomotive engineers and other servants of that class are required to run its trains, and that negligence on the part of those to whom it commits such duty is the negligence of the company.¹

§ 140. Train Dispatcher.—

According to the weight of authority, as well as the best considered cases, a train dispatcher of a railroad, who has the control of the movements of its trains and to whose orders the engineers and conductors are subject, is the representative of the company and not a fellow-servant of those engaged in operating and moving the trains, and the company is liable for an accident occurring through the negli-

latter; and an engineer of the latter, injured by the negligence of such switch tender, may maintain an action against the switch tender's employer. *Smith v. New York, etc., R. Co.*, 10 N. Y. 127; s. c., 75 Am. Dec. 305.

1. *Calvo v. Charlotte, etc., R. Co.*, 23 S. Car. 526; s. c., 55 Am. Rep. 28. See authorities collected *ante* § 29.

A railroad company is liable to any one of its employes operating its road for the negligence of either one of its officers whose duty it is to keep the road in a reasonably safe condi-

tion, and who culpably fails to perform such duty or to give notice or warning thereof. *Kansas City, etc., R. Co. v. Kier* (Kan. 1889), 21 Pac. Rep. 770.

But a laborer employed by a railroad company to remove snow and other obstructions has been held to be a fellow-servant of a track-walker who interfered with a switch with which he had no concern, whereby the laborer was injured. *Fagundes v. Central Pac. R. Co.* (Cal. 1889), 21 Pac. Rep. 437.

gence of such train dispatcher in ordering the movement of its engines and trains, whereby employes on such trains and engines are injured.¹ This conforms entirely with the criterion laid down in this work, for *the functions of a train dispatcher include one of the duties, at least, which the company owes to its employes.* The Supreme Court of Pennsylvania² state this point very clearly: "It is very plain that it was the duty of the defendant company, as between said company and its employes, to provide a reasonably good and safe road, and reasonably safe and good cars, locomotives and machinery for operating its road. It is equally clear that it was its duty to frame and promulgate such rules and schedules for the moving of its trains, as would afford reasonably safety to the operatives who were engaged in moving them. This is a direct, positive duty which the company owed its employes, and for the failure to perform which it would be responsible to any person in-

1. *Smith v. Wabash St. L. & P. R. Co.*, 92 Mo. 359; *Lewis v. Seifert*, 116 Pa. St. 628; *McLeod v. Ginther*, 80 Ky. 399; *Phillips v. Chicago, etc., R. Co.*, 64 Wis. 475; s. c., 23 Am. & Eng. R. R. Cas. 453; *Darrigan v. New York, etc., R. Co.* 52 Conn. 285; s. c., 23 Am. & Eng. R. R. Cas. 438; *Crew v. St. Louis, etc., R. Co.*, 20 Fed. Rep. 87; *Sheehan v. New York Cent. & H. R. Co.*, 91 N. Y. 332; *Chicago, etc., R. Co. v. McLallen*, 84 Ill. 109; *Crew v. St. Louis, etc., R. Co.*, 20 Fed. Rep. 87.

The case of *Robertson v. Terre Haute, etc., R. Co.*, 78 Ind. 77; s. c., 8 Am. & Eng. R. R. Cas. 175 is the only decision which squarely denies this rule. Here the Supreme Court of Indiana say: "The duties of the train dispatcher and the brakeman are quite distinct, but not more so than are the duties of the trackman or the switch-tender and the brake-

man. Safety in running trains requires the prompt and faithful discharge of the duties of all these employes. Their co-operation and combined labor relate to the same object, and are essential to the movement of trains upon the road. The mere fact that the duties of some of the employes are performed upon the train, and those of others at a particular place upon the road, does not, as claimed by the appellant, determine the question of their common employment. If the duties discharged by each relate to the same general object, they must be held to be fellow-servants. It is enough if they are employed for the purpose of effecting the same general object." See also *Slater v. Jewett*, 85 N. Y. 61; s. c., 5 Am. & Eng. R. R. Cas. 515.

2. *Lewis v. Seifert*, 116 Pa. St. 628.

jured as a consequence thereof, whether such person be a passenger or an employe. It would be a monstrous doctrine to hold that a railroad company could frame such schedules as would inevitably or even probably result in collisions and loss of life. This is a personal, positive duty; and, while a corporation is compelled to act through agents, yet the agents in performing duties of this character stand in the place of and represent the principal. In other words they are vice-principals.

"If it be the duty to provide schedules for the moving of its trains which shall be reasonably safe, it follows logically that when the schedules are departed from, when trains are sent out without a schedule, such orders should be issued by the company as will afford reasonable protection to the employes engaged in the running of such trains. I am not speaking now of collisions caused by a disobedience of orders on the part of conductors and engineers, but of collisions or other accidents the result of obeying such orders. At the time of the collision referred to, Wellington Bertolette was the general dispatcher of the defendant company, and from his office in Philadelphia had the general power and authority of moving the trains. In this he was not interfered with by the company or any one else. For the purpose of sending out the trains, he wielded all the power of the company. He could send a train out on schedule time or he could hold it back. He could change the schedule time or make new schedules as the exigency of the case required. He could send a train out without schedule, and direct its movements from his office in Philadelphia. When he issued an order the train was bound to move as he directed. The engineer and conductor had but one duty and that was, obedience. In *Slater v. Jewett*¹ the late Chief Justice Folger thus clearly stated the duties of railways in this particular: 'It is urged, and with rea-

1. 85, N. Y. 61.

son, that clearly arranging and promulgating the general time table of a great railway, is the duty and the act of the master of it ; and that when there is a variation from the general time table for a special occasion and purpose, it is as much the duty and act of the master, and he is as much required to perform it ; that it is the duty and act of the master to see and know that his general time table is brought to the knowledge of his servants who are to square their actions to it ; that the same is his duty and act as to a variation from it, which is but a special time table ; and, therefore, whoever he uses to bring those time tables to the notice of his servants, he puts that person to do an act in his stead, inasmuch as the responsibility is upon him to see and know that it is done, and done effectually, and that if, instead of doing it in person, he chooses to do it through an agent, that agent, *pro hac vice*, is the master, and he, the master, is responsible for a negligent act therein of that agent, whereby a fellow-servant of him is harmed. This rule has been laid down in repeated cases in this court."

The Supreme Court of Connecticut¹ speak as follows with reference to the relation of a train dispatcher and train hands : " It is the duty of a railroad corporation to prepare a time table and adjust the running of its trains so as to avoid collisions. It must also devise some suitable and safe method by which to run special and irregular trains, and regular trains when off their regular time. That cannot be done by general rules. Emergencies will arise which no system of rules can anticipate and provide for, in which the company must act, and act promptly and efficiently. In this case the scheme devised was to have these trains controlled by one who knew the position and movement of every train on the road liable to be affected by them—a train dispatcher, acting in the name and by the authority

1. Darrigan v. New York & N. E. Eng. R. R. Cas. 438.
R. Co., 52 Conn. 285 ; s. c. 23 Am. &

of the superintendent. Is there not a wide and manifest difference between the duty of such an agent and the duty of a locomotive engineer? The duty of the former pertains to management and direction; that of the latter to obedience. It is immaterial that these men are hired and paid by a common employer, and that their employment is designed to accomplish one common result. * * * The train dispatcher, then, in respect to the matter of moving these trains was supreme. The whole power of the corporation whose duty it was to move them safely was delegated to him. He was the agent through whom the corporation attempted to perform its duty. He acted in its name, by its authority and in its stead. The engineer was bound to obey his order. Disobedience or deviation would have been subversive of order and discipline, destructive in its consequences, and just cause for immediate dismissal. He received an order to go west from Waterbury on a single track road at a time when another train was approaching Waterbury from the west. The order was imperative and it required of him explicit obedience. He obeyed. He did not then know the consequences, but the company did or should have known. He conformed to the order as he was bound to; and while so conforming, and as the direct consequence thereof, he was injured. Reason, justice and law require that the company should be held responsible."

In California it has been held that a track repairer injured through the negligence of a train dispatcher in sending out a train may recover against the company;¹ and in Idaho it has been decided that a carpenter in the employ of a railroad company, who was killed while riding on one of the company's trains, in an accident caused by a broken rail, of which the train dispatcher had notice but failed to

1. *McKune v. California So. R. R. Co.*, 177 Cal. 589, 117 P. 2d 302; s. c., 17 Am. & Eng.

notify the conductor of the train, was not a fellow-servant of such dispatcher.¹

§ 141. *Train Hands*.—

In many of the cases the offending employees are not designated otherwise than by the appellation of "train hands." Except in those States where the conductor or the engineer, by reason of their superiority, are held to represent the company, the employees engaged in operating trains are considered as fellow-servants, both of other employees on the train and employees run over or injured in a collision. Thus, where a person in the employ of a railroad company travels back and forth from his home to the place where his services are rendered, upon the cars of the company, and his transportation free of charge, constitutes part of the contract of service, while so traveling he is an employee, not a passenger, and for an injury to him through the negligence of the train hands, the company is not liable, they being his fellow-servants.² A baggageman, in-

1. *Palmer v. Utah & N. R. Co.* Ind. 366; s. c., 74 Am. Dec. 259; (Idaho), 13 Pac. Rep. 425.

2. *Howland v. Milwaukee, etc., R. Co.*, 54 Wis. 226; s. c., 5 Am. & Eng. R. R. Cas. 578; *Ross v. New York, etc., R. Co.*, 74 N. Y. 617; *Tunney v. Midland, etc., R. Co.*, L. R. 1, C. P. 291; *Kansas, etc., R. Co. v. Salmon*, 11 Kan. 83; *Capper v. Louisville, etc., R. Co.*, 103 Ind. 305; s. c., 21 Am. & Eng. R. R. Cas. 525; *Gillshannon v. Stony Brook, etc., R. Co.*, 10 Cush. (Mass.) 228; *Seaver v. Boston, etc., R. Co.*, 14 Gray (Mass.) 466; *Dallas v. Gulf, etc., R. Co.*, 61 Tex. 196; *Russell v. Hudson, etc., R. Co.*, 17 N. Y. 134, reversing s. c. 5 Duer, (N. Y.) 39; *Vick v. New York, etc., R. Co.*, 95 N. Y. 267; s. c., 17 Am. & Eng. R. R. Cas. 609; *Manville v. Cleveland, etc., R. Co.*, 11 Ohio St. 417; *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366; s. c., 74 Am. Dec. 259; *Abend v. Terre Haute & I. R. Co.*, 111 Ill. 202; s. c., 17 Am. & Eng. R. R. Cas. 614.

In a Maryland case, however, it appeared that plaintiff intestate was hired from day to day as a brakeman, running between X. and Y. every day except Sunday, for which day he was not paid unless employed. He was, however, expected to remain at X. from Saturday night till Monday morning, but his family residing in Y., he received permission one Sunday to visit them, and while traveling thither under a conductor's pass, he was killed by the negligence of the company's employees. *Held*, that he was not a co-employee. See also *State v. Western Md. R. Co.*, 63 Md. 433; *O'Donnell v. Allegheny, etc., R. Co.*, 59 Pa. St. 239; *Baltimore,*

jured by a train being thrown from the track through the negligence of the train hands cannot recover.¹ An engine wiper, also, employed in the company's round-house, is a fellow-servant of the men operating a train and cannot recover for any injury he may receive, while walking through the yards, through their negligence.² But an express messenger, carried on a railroad train under a contract with an express company, is a passenger, and not a fellow-servant of the trainmen, and if he is injured through their negligence, he may have his action against the railroad company.³ A track repairer, injured through the negligence of the train hands in failing to light the head-light of the locomotive is not entitled to recover,⁴ or if he is negligent-

etc., *R. Co. v. State*, 33 Md. 542; *Hutchinson v. York, etc., R. Co.*, 5 Exch. 343.

1. *Mosely v. Chamberlain*, 18 Wis. 700.

But in *Central Trust Co. v. Wash, etc., R. Co.*, 34 Fed. Rep. 616, it was held that an expressman and baggageman, killed in a collision while in the discharge of his duty on defendant's passenger train, through the negligence of the employes on defendant's freight train, was not a fellow-servant of such employes, following the Illinois doctrine of consociation, and the case of *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377; s. c., 17 Am. & Eng. R. R. Cas. 501.

2. *Ewald v. Chicago & N. W. R. Co.* 70 Wis. 420; s. c., 33 Am. & Eng. R. R. Cas. 326.

3. *Blair v. Erie R. Co.*, 66 N. Y. 313; s. c., 23 Am. Rep. 55; *Jennings v. Grand Trunk R. Co.*, 15 Ont. App. Rep. 477; *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585. Neither is a person who buys of a railroad company the right to sell popcorn on their trains a servant. Such a

person is a passenger and the company is liable for his death. *Commonwealth v. Vermont & M. R. Co.*, 108 Mass. 7.

A stockholder riding free at the invitation of the president of the road is a passenger and not a fellow-servant of the train hands. *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 482.

4. *Collins v. St. Paul, etc., R. Co.*, 30 Minn. 31; s. c., 8 Am. & Eng. R. R. Cas. 150. "The negligent omission," say the Court, "to provide a head-light (or lantern) upon the locomotive,—it appearing that a head-light is necessary to the safe running of a train in the dark,—would have been the negligence of the defendant, as between it and its servants, for which it would have been liable to them for injuries caused by it. *Drymala v. Thompson*, 26 Minn. 40. There was, however, no evidence that there was not a head-light on the locomotive; on the contrary, the evidence was full and satisfactory that it had a head-light. There was evidence enough that it

ly run over.¹ It makes no difference, where a train hand is injured in a collision through the negligence of other train hands, whether the accident was occasioned by the negligence of the servants manning the train in which the injured servant was, or of those on the other train, or both.²

§ 142. Yard Hands and Yardmaster.—

A yardmaster, through whose negligence an injury occurs to his assistant, is the fellow-servant of such assistant as to all acts done within the range of common employment, except such as are done in the performance of some duty which the company owes to its servants. Thus, in a New York case³ it appeared that McC. was employed

was not lighted at the time. That was due to the neglect of those in charge of the train,—fellow-servants of Collins,—for whose negligence the defendant would not be liable to him or his representatives. *Foster v. Minn. Cent. R. Co.*, 14 Minn. 360."

In *Pennsylvania R. Co. v. Wachter*, 60 Md. 395; s. c., 15 Am. & Eng. R. R. Cas. 187, it was held that where, through fault of persons in charge of a train, the head-light is not exposed in front of the engine in foggy weather, as expressly required by a rule of the company, the company is not responsible for the negligence of such persons unless it failed to exercise proper care in their selection, or retained them in its service with knowledge of their incompetency.

1. *Blake v. Maine Cent. R. Co.*, 70 Me. 60; s. c., 35 Am. Rep. 297; *Gormley v. Ohio & M. R. Co.*, 72 Ind. 31. And see *Corbett v. St. Louis, etc., R. Co.*, 26 Mo. App. 621; *contra*, *Chicago & A. R. Co. v. Kelly* (Ill. 1889), 21 N. East Rep. 203.

A section hand was returning to a section house on a hand-car, which was run into by a train and he was injured. *Held*, that, as at the time of the injury he was running a car on the track, and was brought into direct relations with the employes running the train, they were fellow-servants. *Easton v. Houston, etc., R. Co.*, 32 Fed. Rep. 893.

2. *Hutchinson v. York, N. & B. R. Co.*, 5 Ex. 343; 19 L. J. Ex. 296.

3. *McCasker v. Long Island R. Co.*, 84 N. Y. 77; s. c., 5 Am. & Eng. R. R. Cas. 565.

In *Hardy v. Minneapolis, etc., R. Co.*, 36 Fed. Rep. 657, however, it appeared that M., defendants' yard master, mounted the switch-engine, and, while acting as engineer, gave deceased, a call-boy employed in the yard, directions to assist in uncoupling cars. The latter, while so employed, was run over and killed. *Held*, that the court properly refused an instruction that, while M. was acting as engineer, he was a fellow-servant of deceased, and defendant would not be liable for his acts.

in the yard of defendant to assist the yardmaster L.; he was hired by L. and was under his control and supervision. While McC. was engaged, by the direction of L., in attaching a damaged car, standing on a track in the yard, to another car, L. negligently signaled to an engineer, whose train stood on the track, to back the train, which he did, without signal or warning, and in consequence McC. was crushed between the cars, receiving injuries causing his death. In an action to recover damages it was held that the yardmaster was a fellow-servant of the deceased. Finch, J., said: "The negligence which caused the injury was in no sense that of the master. In moving this train the yardmaster was acting not as the agent of the master in the performance of the master's duties, for it was not the latter's duty to effect the coupling of these cars and their movement to the repair shop. What the yardmaster was doing was the work of a servant, in the department of labor and duty assigned to him as such. No duty which the master owed to his servants was being done by the yardmaster from the negligent performance of which the injury resulted." A yardmaster employed in moving cars back and forth in the company's yard for the purpose of their being repaired is also a fellow-servant of the car repairer, and if he is injured through the yardmaster's negligence, he has no right to recover.¹ And an employe

Though actually engaged as an engineer, he was none the less yardmaster, and entitled to be obeyed in the work of making up trains. And see *Baldwin v. St. Louis, etc., R. Co.* (Iowa), 39 N. W. Rep. 507.

1. *Besel v. New York, etc., R. Co.*, 70 N. Y. 171. In *Kirk v. Atlanta, etc., R. Co.*, 94 N. Car. 625; s. c., 25 Am. & Eng. R. R. Cas. 507, it appeared that a yardmaster had the general management of making up, switching, and receiving trains. *Held*,

that a car repairer was his fellow-servant, and the company was not liable for an injury resulting from his negligence. In *Ritt v. Louisville & N. R. Co.* (Ky.), 31 Am. & Eng. R. R. Cas. 289, it appeared that after a train on the defendant road had arrived at Nashville, and while, according to the evidence, it was doubtful whether it was under the control of the conductor or the yardmaster, the conductor ordered the foreman of the car repairers to go under a

hired to flag trains, who is ordered by the yardmaster to couple some cars, and is injured owing to the latter's failure to signal the engineer, has no right of action.¹ So, if a yardmaster negligently sends an engineer out when a coming train is past due, and the engineer is injured, there can be no recovery if the yardmaster was a competent employe.²

§ 143. Other Railroad Employees.—

A blacksmith and his assistant working together in the company's shops are fellow-servants;³ and a track-walker who is injured by the fall of a lump of coal from a tender, on which it was carelessly piled up by a coal-heaver, has no right of action.⁴ But in Illinois it has been held that a laborer injured by the negligence of a depot superintendent, under whose control he was placed, may have his action against the company.⁵ A railroad company is not liable, however, to a brakeman on one of its trains for injuries suffered from the negligent setting up and use of a derrick by workmen employed in widening its road,⁶ nor to a track repairer who is injured, while attempting to board a train, by other employes working a hand-car.⁷ A flagman performs no duties which properly devolve upon

car and repair a brake, and while he was so engaged, and this was known to the conductor, the train started and the car repairer was run over and killed. *Held*, that, as it was doubtful who had charge of the train, and if it was the yardmaster the company was not liable, he being a fellow-servant of deceased, it was error for the Court to order a verdict for defendant on the ground that the train was in charge of the yardmaster.

1. *Webb v. Richmond & D. R. Co.*, 97 N. Car. 387; *Gravelle v. Minneapolis & St. L. R. Co.*, 3 McCrary (U. S.), 352.

2. *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176; s. c., 2 Am. & Eng. R. R. Cas. 230.

3. *Melville v. Missouri River R. Co.*, 4 McCrary (U. S.), 194.

4. *Schultz v. Chicago & N. W. R. Co.*, 67 Wis 616; s. c., 58 Am. Rep. 881.

5. *Lalor v. Chicago, etc., R. Co.*, 52 Ill. 401.

6. *Holden v. Fitchburg, R. Co.*, 129 Mass. 268; s. c., 2 Am. & Eng. R. R. Cas. 94.

7. *O'Brien v. Boston & A. R. Co.*, 138 Mass. 387; s. c., 52 Am. Rep. 279.

the company. A brakeman¹ cannot, therefore, recover for injuries caused by his negligence; nor a car repairer,² nor a carpenter in a repair shop.³ If an employe negligently puts up a gas-pipe over a railroad track, and another employe in passing under it is struck and injured, it has been held in Pennsylvania that there can be no recovery.⁴ But in Illinois it has been held that the negligence of a person whose duty it is to see that a mail-catcher is not placed too near the track is the negligence of the railroad company, and a fireman injured thereby is entitled to recover.⁵ In another Illinois case⁶ it was held that where it was to some extent the duty of a servant of a railway company, as a night watcher, to note and report upon the conduct of the foreman of a night crew, whose duty it was to make up trains, etc., to his superior, and the night watcher could in no event perform his duty without constantly watching the engine and cars of the night crew while at or upon a crossing of a public street, the night watcher and the foreman of the night crew were fellow-

1. *Cooper v. Milwaukee, etc., R. Co.*, 23 Wis. 668.

2. *Gilman v. Eastern R. Co.*, 13 Allen (Mass.), 433.

3. *Ib.*

4. A railroad company, to operate its shops—foundry, hammer shop, paint shop, and general machine shops—employed a master mechanic, with power to employ and discharge workmen; under him was a general foreman. Each shop had its foreman, and under the shop foreman were gang foremen. A. belonged to a gang whose business it was to bring into the shops the supplies on cars, and to take out the manufactured articles. B., the foundry foreman, obtained permission from C., the master mechanic, to convey a gas-pipe from one shop to another

over a railroad track used by the gang to which A. belonged, which separated the two shops. D., a member of one of the gangs under B., put up the pipe so low that, in passing under it on a car, A. was struck and injured. In an action by A. against the company to recover damages for the injury thus sustained, *held*, that A. and D. were fellow-servants, and that A. could not recover for the negligence of D. in putting up the gas-pipe by which he was injured. *New York, etc., R. Co. v. Bell*, 112 Pa. St. 400.

5. *Chicago, etc., R. Co. v. Gregory*, 58 Ill. 272.

6. *Chicago, etc., R. Co. v. Geary*, 110 Ill. 383; s. c., 17 Am. & Eng. R. R. Cas. 606.

servants, within the legal meaning of that term, and that the common master was not liable to the night watcher for an injury received in consequence of the negligence of the foreman of the night crew in the discharge of his duties in switching cars on one of the tracks over the crossing.

One who is engaged in hauling rock by means of a team, and those who are engaged in blasting such rock, all employed by a common master, are fellow-servants; and such facts being shown by a complaint to recover for an injury to the teamster, an averment that the injured servant "had no connection whatever with any of the employes of the defendant who were engaged in blasting rock," is a mere conclusion, and the facts will control.¹ But in the Territory of Arizona it is held that a teamster who hauls ties in the construction of a railroad is not associated with the engine-driver of a train, on which the workmen ride to dinner, so as to defeat his recovery against the common master for injuries caused by negligence of said engine-driver.²

A telegraph operator whose only connection with the train hands is as transmitter of the train dispatcher's or superintendent's orders is properly a fellow-servant with them. He does not occupy the position of a train dispatcher merely because he transmits or delivers the orders for the movement of the trains, and his negligence cannot be said to be the negligence of the company.³ In

1. *Bogard v. Louisville, etc., R. Co.*, 100 Ind. 491. *Jewett*, 85 N. Y. 61; s. c., 5 Am. & Eng. R. R. Cas. 515. See also *Monaghan v. New York, etc., R. Co.*, 45

2. *Hobson v. New Mexico, etc., R. Co. (Ariz.)* 28 Am. & Eng. R. R. Cas. 360. *Hun (N. Y.)*, 113. Compare *Sheehan v. New York, etc., R. Co.*, 91 N. Y.

3. An engineer injured through the negligence of a telegraph operator is his fellow-servant. *Dana v. New York, etc., R. Co.*, 23 *Hun (N. Y.)*, 473; and a fireman, *Slater v. Jewett*, 85 N. Y. 61; s. c., 5 Am. & Eng. R. R. Cas. 515. Where, however, a telegraph operator is negligent in failing to report defects in tracks and bridges, as required by a rule of the company, it has been properly held that

Tennessee¹ and West Virginia,² however, where the different department limitation prevails, it is held otherwise, and a railroad company has been held liable for the negligence of a telegraph operator. In Missouri³ a wreckmaster who negligently orders a car to be coupled with a rope instead of a chain has been held not to be the fellow-servant of a bridge carpenter who was injured in an accident caused by such negligence. And in England it has been held that a laborer employed to do ballasting for a railway company is a fellow-servant of one employed to lay tram-plates and cannot recover for an injury received through his negligence while they were so employed.⁴

he was not the fellow-servant of a brakeman injured thereby, but a representative of the company, for whose negligence it was responsible. *Hall v. Galveston, etc., R. Co.* (C. C. Tex.), 39 Fed. Rep. 18. See § 29.

1. In an action brought by the conductor of a train against a railroad company for damages for injuries received in a collision resulting from the negligence of a telegraph operator in the employ of the company, the Court, in its instructions to the jury, said: "If you find that D. was conductor, and had a full crew of hands for managing the train; that B. as telegraph operator had nothing to do with the actual management of the train, but was only connected with D. as the medium through which orders were transmitted from G., the superintendent of the railroad, to D., then D. and B. are not fellow-servants, and the risk of injury from the negligence of B. is not such a risk as the law places on D. by reason of his employment as conductor." *Held*, that the instruction was correct. *East Tennessee, etc., R. Co. v. De Armond* (Tenn.) 5 S. W. Rep. 600.

2. Where an engineer upon one

train of a railroad company is injured by the negligence of the conductor of another train of the company, running in an opposite direction, or by the fault of one of the company's telegraphic operators in transmitting a telegraphic order to such conductor, such engineer, being wholly without fault or the means of preventing such negligence or of avoiding its consequences, is not the fellow-servant of said conductor, nor is he the fellow-servant of said operator in regard to acts and telegraphic orders between the operator and said conductor, within the rule which exempts the company from liability for the negligent acts of fellow-servants or persons engaged in the common service; and the company will be held responsible for an injury to such engineer caused by the negligence of such conductor or operator in such manner. *Madden v. Chesapeake, etc., R. Co.*, 28 W. Va. 610; s. c., 57 Am. Rep. 695.

3. *Tabler v. Hannibal, etc., R. Co.*, 93 Mo. 79; s. c., 31 Am. & Eng. R. R. Cas. 185.

4. *Lovegrove v. London, etc., R. Co.*, 16 C. B. N. S. 669; 33 L. J. C. P. 329.

CHAPTER X.

WHO ARE AND WHO ARE NOT FELLOW-SERVANTS—EMPLOYEES NOT IN RAILROAD SERVICE.

- § 144. Persons Employed on and about Vessels.
- 145. Persons Employed in and about Mines.
- 146. Persons Employed in Mills, Factories, etc.
- 147. Builders, Carpenters, Masons, etc.
- 148. Other Employees.

§ 144. Persons Employed on and About Vessels.—

There is no distinction in the application of the fellow-servant rule made in favor of this class of employees. The same principles apply whether the offending or injured employe is a seaman or a landsman. It is accordingly held that if the mate of a vessel is injured through the negligence of the captain or master there can be no recovery, they being fellow-servants.¹ But if the action is by an ordinary seaman for an injury caused by the negligence or unskillfulness of the captain, it has been held by the Supreme Court of Wisconsin that it would lie. Thus in *Thompson v. Hermann*² it appeared that the master, who was also part owner, ordered the plaintiff, a seaman, to adjust the rigging in a dangerous manner, though the plaintiff protested and suggested a safe way of adjusting it. But the master refused to adopt the safe course, and imperatively ordered the work to be done in a dangerous manner. The plaintiff while in the careful discharge of his

1. *Mathews v. Case*, 61 Wis. 491; W. Rep. 744.
s. c., 50 Am. Rep. 152; *Caniff v. Blanchard Nav. Co.* (Mich.), 33 N. 784. 2. 47 Wis. 602; s. c., 32 Am. Rep.

duty, obeying the master's order, fell and was injured. It was held that the plaintiff might recover. "The decision was placed mainly on the peculiar character of the employment, and the relations existing between the master and a common seaman of a merchant vessel outside of port."¹ But this is not the rule in all jurisdictions.* A ship owner should not be held responsible for the mere neglect of officers, to properly perform their duty if those duties do not include the personal obligations of the owners to furnish proper appliances, competent servants, etc. If they provide a seaworthy ship properly equipped and commanded by competent officers, they have discharged their duty toward the subordinates. "They must be deemed to have entered upon the service with the understanding that they take the chances of the neglect or carelessness of any or all others who are engaged in the common employment and occupation of loading, unloading or running the boat."³ The master of a lighter has been held to be a fellow-ser-

1. *Mathews v. Case*, 61 Wis. 491; s. c., 50 Am. Rep. 151.

2. In a New York case it appeared that injury resulted to a hand employed on a State boat, through the negligence of Wells, the captain, who at the time was engaged, with several hands employed on the boat (including the claimant), in digging clay from a bank, and loading the boat. The negligence consisted in setting the claimant to work under the bank after Wells had loosened the overhanging earth, so that it fell upon and injured the plaintiff. It was held that Wells, though captain of the boat, with power to direct those under him, was, nevertheless, a co-servant within the rule. "The manner of proceeding with the work was committed to Wells. It involved the exercise of such discretion and judgment only as is committed to a

foreman. It is not claimed that Wells was incompetent for the position, and no question as to the suitability of appliances provided by the State arises. It is the ordinary case of mismanagement of a co-employee of a superior grade as to the manner of prosecuting an ordinary work in which he, and other employes acting under him, were at the time engaged. This was a risk incident to the employment which the claimant assumed, and the injury not being one for which the master, if an individual, it is not, therefore, one for which the State is liable." *Loughlin v. State*, 105 N. Y. 159.

3. *Blodgett, J.*, in *Malone v. Western Trans. Co.*, 5 Biss. (U. S. C. C.), 315: "The navigation of a ship constitutes one common employment, for which all the ship's company are employed. Neither the vessel nor

vant of his crew.¹ And a laborer shovelling grain for an elevator company, and the captain of a tug, owned by the company, engaged in bringing a vessel to the elevator, are fellow-servants.² Treating the pilot as the master of a vessel, he is responsible for its management and navigation, and it has been held by the United States Circuit Court for the Southern District of New York that he is not a fellow-servant of a deck hand who is injured through his negligence.³ The mate of a vessel and a common sailor or deck hand are considered as fellow-servants in all jurisdictions save those in which the negligence of almost any superior servant having authority to command is held to be the negligence of the master. "If we are asked to establish a special rule," say the Supreme Judicial Court of Massachusetts,⁴ "applicable only to mates of vessels and common sailors, on the ground of the peculiar relations between them, the existence and particulars of those relations must be shown. The evidence in the case at bar discloses only facts which, under the decisions of this Court, show that the mate and the plaintiff were fellow-servants of the defendant".⁵ Allen, J., also said: "The

her owners, therefore, are liable, according to the principles of municipal law for injuries happening to a seaman through the negligence of any of his associates in the performance of their ordinary duties." *The City of Alexandria*, 17 Fed. Rep. 390.

1. *Johnson v. Boston, etc., T. Co.*, 135 Mass. 209; s. c., 46 Am. Rep. 458.

2. *Baltimore Elevator Co. v. Neal*, 65 Md. 438. As to whether a fireman and master of a steam tug are fellow-servants, see *Clatrop Chief*, 7 Sawy. (C. C.) 274.

3. *The Titan*, 23 Fed. Rep. 413, following *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377; s. c., 17 Am. & Eng. R. R. Cas. 501. See also *Smith*

v. Steele, L. R. 10, Q. B. 135.

4. *Benson v. Goodwin*, 147 Mass. 237.

5. See also, *Holverson v. Nisen*, 3 Sawy. (U. S.) 562; *Olson v. Clyde*, 32 Hun (N. Y.), 425; *The City of Alexandria*, 17 Fed. Rep. 390; *Malone v. Transportation Co.*, 5 Biss. (U. S.) 315; *Mathews v. Case*, 61 Wis. 491.

A second mate superintending the work of reeling in a hawser is a fellow-servant with a seaman turning the reel on board ship. *The Egyptian Monarch*, 36 Fed. Rep. 773.

A grain trimmer employed by a contractor to assist in trimming the grain with which a vessel is being loaded has been held not to be a fel-

plaintiff contends that the case of mate and common seaman on a merchant vessel is an exception. We can see nothing in the evidence reported which excepts this case from the rule applied to a superintendent of work, and one working under his orders. The *Chandos*, 4 Fed. Rep. 649; *Daub v. Railway Co.*, 18 Fed. Rep. 625; and the *Neptune*, 30 Fed. Rep. 925, are cited to sustain the ruling of the court that a common sailor and a mate are not fellow-servants. The first case contains, on this point, *dicta* only, of Deady, J. The second case contains a report of an oral charge to a jury by the same judge, which expressly assumes the responsibility of instructions against the admitted probable weight of authority. The third case was against the owners of a vessel, one of whom was the master, for negligence of the master. Whether a person who was 'taking a run' from Bath to New York as a 'sailor or runner,' without signing shipping articles, would be a common sailor within the meaning of such a rule, we cannot decide, because we do not find any such rule."

A boatswain of a vessel and a stevedore, selected by the boss stevedore and paid by the ship's owner, are fellow-servants and the latter is not entitled to recover for the negligence of the former in managing a steam-winch used in hoisting cargo whereby he was injured.¹ But a longshoreman engaged in discharging a ship's cargo who is injured through the negligence of the officers of the vessel in failing to provide proper appliances is entitled to damages;² and the same principle has been applied where a stevedore engaged in unloading cargo was injured through the negligence of a head stevedore who had charge of the

low-servant of the mate who directed

the placing of the covers on the hatches. *Crawford v. The Wells City*, 38 Fed. Rep. 47.

878.

2. *The Carolina*, 30 Fed. Rep. 199. See also *Crawford v. The Wells City*, 38 Fed. Rep. 47.

1. *The Furnessia*, 30 Fed. Rep.

tackle in supplying a defective rope; the Supreme Court of Pennsylvania held that they were not fellow-servants.¹ But ordinarily a ship owner is not liable for an injury to his employe by the negligence of a stevedore in loading the vessel.²

A chief engineer and a third engineer on a steamer are fellow-servants;³ so are employes loading a vessel with coal and a coal hoister.⁴ In a recent New York case⁵ it appeared that the defendant, a contractor, had employed a competent superintendent, who had general charge of a job of repairing a vessel, and had authority to engage all necessary workmen under him. Plaintiff's intestate was so employed, and was engaged in the hold of the vessel. Three decks extended above him, with hatchways, which, when uncovered, presented an open space through all of the decks to the hold. The superintendent ordered some workmen to remove the hatch. Through their carelessness, the hatch slipped, and fell through into the hold, upon plaintiff's intestate. The Court of Appeals held that the defendant was not liable.

An Irish case⁶ showed the following facts: The deceased was employed, with others, to shift a cargo on the defendants' vessel. Upon going on board the names of

1. *Mullan v. Philadelphia, etc., Steamship Co.*, 78 Pa. St. 25; s. c., 21. Am. Rep. 2,

2. *Rankin v. Merchants, etc., Transp. Co.* 73 Ga. 229; s. c., 54 Am. Rep. 874. Compare *Murray v. Currie*, L. R. 6 C. P. 24.

In California it has been held that the foreman of a gang of men to whom a stevedore delegates the entire management of the work of unloading a vessel, with full discretion to control and supervise it, is not a fellow-servant with his subordinate employes; and if, in the performance

of the work, death or injury results to such an employe through the negligence of the foreman, the stevedore is liable, although he exercised due care in the selection of a foreman. *Brown v. Sennett*, 68 Cal. 225. See also *The Wm. F. Babcock*, 31 Fed. Rep. 418.

3. *Searle v. Lindsay*, 11 C. B. (N. S.) 429.

4. *The Islands*, 28 Fed. Rep. 478.

5. *Hussey v. Cogger*, 112 N. Y. 614.

6. *McCarthy v. Bristol Ship-owners' Co.*, 10 L. R. Ir. 384.

the men employed were taken down by one of the officers, who told them to go down between decks to have supper. In going below it was necessary to pass round an open hatchway, which was insufficiently lighted, and the passage round which was obstructed by some obstacles. The deceased, when returning from supper, fell through the open hatchway and was killed. Upon these facts it was held, that, even assuming negligence, it was the negligence of a fellow-servant of the deceased, and that, as there was no evidence of the negligent employment by the defendants of the incompetent fellow-servant, the plaintiff suing for damages for the death of the deceased, was rightly nonsuited.

§ 145. Persons Employed in and About Mines.—

A mining captain who has the entire management of a mine, without direction or interference by the owner, occupies the owner's place, and is not a mere fellow-servant of a laborer employed in the mine, even though he was not appointed directly by the owner, but only by the owner's agent, and the owner is liable for his negligence.¹ But an ordinary mining-boss is a fellow-servant of the miners.² And a mining employe who is injured by rock falling upon him while he was engaged in investigating the result of a recent blast at the direction of the foreman is a fellow-

1. *Ryan v. Bagaley*, 50 Mich. 179; s. c., 45 Am. Rep. 35. The report of this case does not show in what the negligence of the mining captain consisted. The laborer was killed by the fall of a water-pipe which was being hoisted from below. We may infer, therefore, that some appliance was defective. See also *Quincy Mining Co. v. Kitts*, 42 Mich. 34; *Beeson v. Green Mountain, etc., Co.*, 57 Cal. 20. In *Redden v. Union Pac. R. Co.* (Utah), 15 Pac. Rep. 262, it is held

that a foreman having entire supervision of a mine, and all its workings, employing and discharging laborers, and prescribing their duties, is not a co-employe within the rule which exempts the master from responsibility.

2. *Waddell v. Simonson*, 112 Pa. St. 567; *Delaware & H. Canal Co. v. Carroll*, 89 Pa. St. 374; *Reese v. Bidle*, 112 Pa. St. 72; *Redstone Coke Co. v. Roby*, 115 Pa. St. 364.

servant of the latter.¹ So, a mining-boss, under the Pennsylvania Act of March 3, 1870, is a fellow-servant with a driver boy employed to haul coal from the chambers of the mine;² and a "driver-boss" and a mining-boss are fellow-servants.³ And it has been held that the negligence of a mine roof superintendent, whereby a miner was injured, was not the negligence of the company.⁴ The engineer of a mine, whose duty it is to lower and raise the cages used in the operation of the mine, and the laborers and miners in the mine are co-servants, and the owners of the mine are not liable for damages resulting to the latter

1. *Stephens v. Doe*, 73 Cal. 26. See also *Wilson v. Merry*, L. R. 1 H. L. (Sc. App.) 326.

2. *Waddell v. Simonson*, 112 Pa. St. 567. And see *Redstone Coke Co. v. Roby*, 115 Pa. St. 364.

The owners of a colliery within the Coal Mines Regulation Act, 1872 (35 & 36 Vict. chap. 76), appointed a certificated manager as required by § 26. A miner employed in the colliery was killed by an explosion of fire-damp, the death being caused by the negligence of the manager. *Held*, that the fact that the manager was appointed pursuant to the Act did not put him in any different position from that which he would have held had he been simply appointed manager; and that he was a fellow-servant with the deceased; and that the owners were, therefore, not liable to his representatives for his death. *Howells v. Landore Steel Company*, 10 L. R. Q. B. 62; 44 L. J. Q. B. 25.

3. *Lehigh Coal Co. v. Jones*, 86 Pa. St. 432.

4. *Troughear v. Lower Vein Coal Co.*, 62 Iowa, 576. In *Hall v. Johnson* 3 H. & C. 589, the plaintiff was

employed to work in a mine of the defendants. The defendants employed an underlooker, whose duty it was to see that the roof of the mine was propped as required when the mineral was withdrawn. The underlooker omitted to see that the roof was propped, and thereby a stone fell and injured the plaintiff. *Held*, that the underlooker was a fellow-servant of the plaintiff, and that as there was no evidence to show that the defendants were negligent in selecting a proper underlooker, or in putting the mine in proper order, the defendants were not liable.

One who contracts with a mining company to break down rock and ore for a certain distance, to disclose the vein, at a stipulated price per foot, the company to furnish steam drill and to keep the drift clear of rock as the contractor broke it down, is to be regarded as a contractor with, and not a servant of, the company. He is not a fellow-servant with the superintendent of the company, under whose direction the work is performed. *Mayhew v. Sullivan Mining Co.*, 76 Me. 100.

through the negligence of the former.¹ "Roadmen" are fellow-servants of ordinary miners,² and so are "pickers"³ and "blasters."⁴ If the owner of a mine has negligently allowed fire-damp to accumulate, and it is ignited by a servant who goes into it with a lighted lamp instead of a safety lamp, contrary to the owner's orders, and another servant is injured by an explosion, the latter has no remedy against the owner.⁵ In Michigan it is held that a common workman employed about a mine, but not himself a miner, is not a fellow-employee of the miners in any such sense that he cannot recover for an injury caused him by the mining operations. And his employer is bound to see that the premises where he works are reasonably safe.⁶

§ 146. Persons Employed in Mills, Factories, etc.—

The owner of mills and machinery, which men are employed to operate, owes duties to his employes which he cannot escape by absenting himself and committing the entire charge to an agent. Such agent, in respect to the duty of providing safe machinery, represents the master.⁷ A manufacturing corporation employed a superintendent who had charge of all its machinery and works in several mills. Under him and appointed by him were overseers

1. *Starne v. Schlothane*, 21 Ill. App. 97; *Buckley v. Gould, etc., Mining Co.*, 14 Fed. Rep. 833; *Bartonshill, etc., Coal Co. v. Reid*, 3 Macq. 266.

2. *Troughear v. Lower Vein Coal Co.*, 62 Iowa, 576.

3. *Keilley v. Belcher, etc., Co.*, 3 Sawy. (U. S.), 500.

4. *Ib.*

5. *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285; s. c., 35 Am. Rep. 304.

6. *James v. Emmet Mining Co.*, 55 Mich. 335.

One who is engaged in hauling rock by means of a team, and those

who are engaged in blasting such rock, all employed by a common master, are fellow-servants, and such facts being shown by a complaint to recover for an injury to the teamster, an averment that the injured servant "had no connection whatever with any of the employes of the defendant who were engaged in blasting rock," is a mere conclusion, and the facts will control. *Bogard v. Louisville, etc., R. Co.*, 100 Ind. 491.

7. *Mitchell v. Robinson*, 80 Ind. 281; s. c., 41 Am. Rep. 812; *Foster v. Pusey (Del.)*, 14 Atl. Rep. 545.

of the several rooms, whose duty it was to keep watch of the machinery and oversee the work in their respective rooms. These overseers appointed second hands, whose duty it was to act as overseers of the rooms in their absence. There was also an overseer of repairs, whose duty it was to make repairs on notice from the superintendent or overseer of a room that repairs were needed. Some new machinery having been procured, the person setting it up notified the superintendent that collars were needed on certain counter-shafts before they were used, and the superintendent notified the overseer of repairs to put them on, but through negligence he failed to do so, and by reason of the want of collars a counter-shaft fell and injured the plaintiff, an employe in the room. The Supreme Court of Connecticut held that the negligence was that of the corporation, and that it was liable for the injury.¹ In a Georgia case the plaintiff, a girl fifteen years old, was employed in the defendant's factory and was kept at work until three o'clock Sunday mornings, and was then, by order of the superintendent, allowed to remain in the factory until daylight, but only in a basement room. On the occasion in question the night overseer of the factory, finding the basement room damp, put the plaintiff, with other children operatives, in a second-story lighted room, which had an unguarded elevator hole in the adjoining unlighted passageway. The children played at hide-and-seek, and the plaintiff, running into the passageway, fell through the hole and was injured. The Court held the defendant was properly held liable.² But it is not every negligent

1. *Wilson v. Willimantic Linen Co.*, 50 Conn. 433.

2. *Atlanta Cotton Factory v. Spear*, 69 Ga. 137.

In an action to recover damages for injuries alleged to have been caused by defendants' negligence, it appeared that defendants were engaged in the manufacture of articles from wood. The lumber used was planed on the first floor of their establishment and then passed up through an opening to the floor above. This opening was in a passageway where those employed on the second floor passed back and

act of a superintendent or agent of a mill or factory which will bind the proprietors.¹ Thus, plaintiff was an employe in defendant's iron works, which were under the management and control of defendant's agent, B., the defendant living elsewhere, and only occasionally visiting the works. B. carelessly let steam on an engine near which plaintiff was working, whereby the plaintiff was injured. In an action for that injury, the Court charged that B. represented the defendant only in respect to the duties confided

forth in the performance of their work; when not in use it was closed by a heavy trap-door. Plaintiff, an employe of the defendants, was going along the passageway in the performance of his work, when the trap-door was suddenly raised from below by a workman in the planing room; plaintiff fell through the opening and was injured. Plaintiff had been in defendants' employ for about twenty-two months, and was fully informed as to the location and use of the trap-door and the manner of its construction. Defendants had given instructions that the trap-door should not be opened from below, and the employe who opened it had been so instructed by the foreman. *Held*, that the action was not maintainable, as the injury was caused by the negligence of a co-employe; that the location of the trap-door in the passageway was not *per se* a wrongful act; that the defendants had a right to place it there and were not bound to change the arrangement to secure greater safety to their employes; and that plaintiff took the risk of the obvious dangers connected with his employment. *Anthony v. Leeret*, 105, N. Y. 591.

1. The chief manager of charcoal works, who works at charging the retorts, etc., with no direct charge over the machinery, but with the

right to repair it, and with the duty to see whether it is out of repair, but with no authority to buy, alter, or change machinery, where the works and machinery are inspected once or twice a week by different officers of the company, is a fellow-servant of a man employed in such works in using an apparatus consisting of a large bucket hanging from a yoke which runs on a wheel on an overhead track, and is not a vice principal whose negligence as to such workman will make the employer liable. *Yates v. McCullough Iron Co.* (Md. 1889), 19 Md. L. J. 837.

The overseer of the slashing-room in a cotton-mill is a fellow-servant with the second foreman of the machine-shop department, whose duty it is to oversee the repairing of machinery in any of the departments on the report of the overseer of that department, subject, however, to the orders of his immediate foreman and the general superintendent, who has the control and direction of all the employes; and the mill-owner is not liable for an injury to the foreman caused by a barrel thrown negligently from a window by the overseer. *Brodeur v. Valley Falls Co.* (R. I. 1889), 17 Atl. Rep. 54. See also *McBride v. Union Pac. R. Co.* (Wyo. 1889), 21 Pac. Rep. 687.

to him as managing agent, but refused to charge that, as to other duties, he was to be regarded as a fellow-servant with the plaintiff, and left it as a question of fact. The New York Court of Appeals held that such refusal was error.¹ In a Massachusetts case² the plaintiff was at work as a carpenter in the establishment of a manufacturing corporation putting up certain partitions. A superintendent of the corporation negligently placed a tackle-block and chains upon an iron rail suspended from the ceiling of the room in such a manner and so unprotected that they fell and injured the plaintiff. The Court held that the plaintiff and superintendent were fellow-servants.

Where both the offending and the injured servants are subordinate employes and the former is not vested with the performance of any of the master's duties they are clearly fellow-servants.³ Thus, a manufacturing company had leased a rolling-mill, which was out of repair. J. was the general manager and superintendent of the company. E., a millwright and machinist, was in the employ of the company under daily pay. J. sent him to take charge of the repairs, and, as an inducement to hasten the work, was to pay him an extra \$50 therefor. B., a carpenter, was employed by E. and directed by him, but paid by the company. While thus employed he was injured. It was held that he was a fellow-servant of E., and could not recover damages from the company for his injuries.⁴ In

1. *Crispin v. Babbitt*, 81 N. Y. 516; s. c., 37 Am. Rep. 521.

2. *Osborne v. Morgan*, 130 Mass. 102.

3. A "helper" in a foundry and a driver of a truck are fellow-servants. *Hogan v. Central Pac. R. Co.*, 49 Cal. 128.

One who works at odd jobs around the mill-yard of a corporation operating a saw-mill and salt-block, and

occasionally loads salt on a barge for market, is the fellow-servant of men in the salt warehouse handling bargels, and cannot recover for injuries received from a descending elevator, through their negligence. *Sell v. Reitz & Bro.'s Lumber Co.* (Mich. 1888), 38 N. W. Rep. 481.

4. *National Tube Works v. Bedell*, 96 Pa. St. 176.

another case decided by the same Court it appeared that a corporation engaged in the manufacture of iron for different purposes maintained several establishments, each having a separate purpose and foreman, but all being under one general superintendent. A. was employed to operate a steam-hammer at one of the departments known as the forge. The company, in replacing the hammer with a new one, took some of its operatives from another department known as the foundry, and engaged them to complete the repairs, in the course of which the said operatives negligently left a supporting beam unfastened. A. was not present when this was done, but in other respects assisted to some extent in the completion of the repairs. He was directed by the foreman of the forge to see that "everything was right" about the machine. Upon the completion of the repairs A. resumed the operation of the machine, and was killed by the falling of the unfastened beam. In an action by A.'s widow against the corporation it was held that he was a fellow-servant of the operatives who made the repairs, and whose negligence caused the accident.¹ And in another case the plaintiff was injured while escaping from defendant's burning mill. The fire was caused by the heating of a bearing of one of the machines used in the mill, and might easily have been extinguished at first, but, although there was a cistern with pipes and hose, the water would not run. It was held that this failure must be attributed to the negligence of plaintiff's fellow-servants either in care or operation, and there could

1. *Reading Iron Works v. Devine*, 109 Pa. St. 248. A servant suing a railroad company to recover damages for injuries caused by a steam-hammer of the company, while he was in the company's employ, cannot recover, although the injuries were caused by the defective condition of the hammer, or by negligence of the agents of the company, or by both combined, without showing also that the company did not use reasonable care in procuring for its operations sound machinery and faithful and competent employees. *Hanrathy v. Northern Cent. R. Co.*, 46 Md. 280.

be no recovery for the injury.¹ In a New Jersey case² it appeared that the defendant owned a saw-mill, and gave an order to D. & W., master machinists, to make some alterations in the gearing of the water-wheel of his mill. D. & W. sent the plaintiff and another workman to do the work. It was understood between these workmen and the defendant that the mill would run at such times as they were not actually at work upon the wheel. While they were at work upon the wheel the engineer of the defendant negligently started the wheel, injuring the plaintiff. It was held that plaintiff was a servant of the defendant, engaged in a common employment with the engineer.

§ 147. Builders, Carpenters, Masons, etc.³—

A person building a structure of brick and wood is not responsible for the fall of the masonry upon a carpenter, whereby he was killed, when guilty of no negligence, and the mason being competent, although his judgment in the particular case was at fault.⁴ So a plumber and a car-

1. Jones v. Granite Mills, 126 Mass. 84.

2. Ewan v. Lippincott, 47 N. J. L. 192; s. c., 54 Am. Rep. 148.

A servant employed on a slubber machine in a cotton-mill, whose duty it was to see that the machine was kept running, to take off the full bobbins and put on others, to notify the overseer if she knew that there was anything wrong about the machine, and to see that it was kept clean, and the person whose business it was to keep the machine in repair, are fellow-servants. Rice v. King Philip Mills, 144 Mass. 229.

3. See ante §§ 25, 26, 27, 28.

4. Keith v. Walker Iron & Coal Co. (Ga.), 7 S. E. Rep. 166.

The owner of a building employed a carpenter to do carpenter work

and a mason to do mason work thereon, and, while one of the men employed by the mason, in the performance of his duties in the line of his employment, was ascending a ladder which had been erected by the carpenter, the ladder gave way by reason of its defective construction, and the man fell to the ground, receiving injuries from which he died. Held, in an action against the owner, by the father of the person injured, to recover damages for his death, alleged to have been occasioned by the negligence of the carpenter in the construction of the ladder, that there was no cause of action shown, it not appearing that it was the duty of the carpenter, in the course of his employment as such, to build this ladder for the mason's

penter working together on the same building have been held to be fellow-servants;¹ but a draftsman engaged on certain works, and a carpenter employed in jobbing about the premises, are not servants engaged in a common employment; when the former leaves the building at the end of his day's work, he occupies the same relation to his principal as any other citizen.² A mill-wright and a carpenter were held to be fellow-servants by the Supreme Court of Pennsylvania.³ And a laborer working about a building and a carpenter have been held to be fellow-servants,⁴ and so have a carpenter and his foreman.⁵ One employed in a building in process of construction, to drill holes in an iron girder on the fourth floor, is a fellow-servant of persons engaged in clearing up rubbish on the eighth floor and dumping it through the open floors into the cellar.⁶

§ 148. Other Employees.—

A servant of the proprietor of an elevator was injured by the falling of an elevator used to hoist grain into a stor-

use, or that he was specifically employed by the owner to build it. *Mercer v. Jackson*, 54 Ill. 397.

1. *Killea v. Faxon*, 125 Mass. 485.

2. *Baird v. Pettit*, 70 Pa. St. 477.

3. *National Tube Works v. Bedell*, 96 Pa. St. 175.

4. *Malone v. Hathaway*, 64 N. Y. 5; s. c., 21 Am. Rep. 573.

A person was in the employment of a railway company as a carpenter to do any carpenter's work for the general purposes of the company. He was standing on a scaffolding at work on a shed close to the line of a railway, and some porters in the service of the company carelessly shifted an engine on a turn-table so that it struck a ladder supporting the scaffold, by means of which he was thrown down and injured. *Held*, that the company was not liable.

Morgan v. Vale of Neath R. Co., 1 L. R. Q. B. 149. Compare *Mulchy v. Methodist, etc., Soc.* 125 Mass. 487.

5. *Neubauer v. New York, etc., R. Co.*, 101 N. Y. 607; *Yager v. Atlantic, etc., R. Co.*, 4 Hughes (U. S.), 192; *Louisville & N. R. Co. v. Lahr* (Tenn.), 6 S. W. Rep. 663.

In *Slater v. Chapman* (Mich.), 35 N. W. Rep. 106, however, a workman engaged in the erection of a building, injured through the negligence of one having the full control of the erection and the men, was held entitled to recover of the master.

A hod-carrier and his foreman are fellow-servants. *Green v. Banta*, 48 N. Y. Sup. Ct. 156.

6. *Somer v. Harrison* (Pa.), 8 Atl. Rep. 799.

age building. The accident was occasioned by the negligence of the engineer in charge, in allowing the elevator to be carried too high, thereby breaking the rope by which it was raised. The General Term of the New York Supreme Court held that the defendant was not liable for such neglect of a co-employee of plaintiff.¹ It has also been adjudged that a laborer and a foreman using a derrick are fellow-servants;² and that a foreman in charge of a derrick is a fellow-servant of a laborer engaged in moving a stone on a truck, both being in the employ of the same master.³ Men employed at a hopper at the foot of a hill to unload cars and crush stone taken from a quarry situated on the side of the hill, and moved by trucks to a turntable, from which it is carried by an inclined railway to such hopper, are fellow-servants of those at the turntable, and sustain the mutual relation of agents, the one to the other, although one of the latter was charged with the special duty of attaching a cable to the loaded car and paid an extra price therefor.⁴ A member of a city fire department who receives an injury caused by a defective street is not precluded from recovering by the fact that a member of the street department was negligent in performing his duties.⁵ In a Massachusetts case it appeared that a laborer em-

1. *Stringham v. Stenartt*, 27 Hun (N. Y.), 562.

Where an elevator is used to carry employes to and from their work, an engineer who had control of its motive power, the elevator-boy, and one of the employes who is being carried to his work, are fellow-servants, for whose negligence the master is not liable. *Wolcott v. Studebaker*, 34 Fed. Rep. 8.

2. *Duffy v. Upton*, 113 Mass. 544.

3. *Scott v. Sweeny*, 34 Hun (N. Y.), 292.

A brakeman on a railroad train, injured by a laborer setting up der-

rick, is his fellow-servant. *Holden v. Fitchburg, etc., R. Co.*, 129 Mass. 268; s. c., 2 Am. & Eng. R. R. Cas. 94.

4. *Fort Hill Stone Co. v. Orm*, 84 Ky. 183.

5. *Coots v. City of Detroit* (Mich. 1889), 43 N. W. Rep. 17; *Turner v. Indianapolis*, 96 Ind. 51. The Court observe, in the course of the opinion in this case, that the fellow-servant rule is inapplicable to a suit against a municipal corporation. The result of the decision is certainly correct, but this *dictum* clearly erroneous. The rule has been applied

ployed by a mill corporation in its yard, a part of his duty being to assist its teamster, undertook with the teamster and another to lift on to a low truck some steps which were too heavy for three men to handle, for the purpose of moving them from one part of the premises to another; and the steps fell and injured him. There were at hand seven or eight other men, upon whom the teamster might have called for assistance, and all the tools and appliances necessary to move great weights. In an action against the corporation to recover for the injuries, it was held that the negligence, if any, which caused the injuries, was that of the plaintiff and fellow-servants.¹ In another case the plaintiff (who was a licensed waterman and lighterman) was in the employ, at weekly wages, of the defendant, a corn merchant and warehouse keeper; his ordinary duty being to attend at the waterside of the premises every tide for about an hour and a half before and after high water, for the purpose of bringing barges to and from the wharf and there mooring and unmooring them. It was no part of his duty to load or unload the barges or to assist in any way in the work of the warehouse; but it was his habit to go to the office on the land side of the warehouse for orders, or when sent for by the defendant's manager. There were two ways of going there, viz.: by landing from his boat at stairs at the end of the street next adjoining the warehouse, or by stepping from the barges into and going through the warehouse and out by a door to the street. He usually went by this latter way. Being on the barges

many times in actions against municipalities. See *McDermott v. Boston*, 133 Mass. 349. A person employed by a city to superintend the digging of a trench, and a person employed as a laborer to dig the trench by the same master, are, *prima facie*, fellow-servants; and, to maintain an action against the

city for personal injuries occasioned to the laborer by the negligence of the superintendent, the declaration must allege facts, the legal effect of which is that they are not such fellow-servants. *Flynn v. Salem*, 134 Mass. 351.

1. *Dunlap v. Barney M'fg. Co.*, 148 Mass. 51.

at a time when his actual duty did not require him to be there, he was sent for to the office, and was proceeding thither by his accustomed route, when, in passing out from the warehouse door to the street, he was knocked down and injured by a sack of grain which another of the defendant's men was in a negligent manner hoisting by means of a crane from a wagon. It was held that this was an injury caused by the negligence of a fellow-workman, and consequently that the master was not liable.¹

1. *Lovell v. Howell*, 1 C. P. D. 161; 45 L. J. C. P. 387.

APPENDIX.

EMPLOYES' MUTUAL INSURANCE SOCIETIES.

- § 1. Subject in General—Utility of such Societies,
2. Compulsory Membership.
3. Release of Employers from Liability for Injury.
4. London and North Western Railway Insurance Society.
5. London and North Western Provident and Pension Society.
6. London and North Western Railway Superannuation Fund Association.
7. Relief Department of the Baltimore & Ohio Railroad Company.
8. Pennsylvania Railroad Company's Voluntary Relief Department.
9. New York and Northern Railroad Employees' Mutual Benefit Association.
10. Burlington Voluntary Relief Department.
11. Brown and Sharpe Mutual Relief Association.

§ 1. Subject in General—Utility of Such Societies.—

The unsatisfactory state of the law regarding a master's liability for injuries to his servants, particularly that relating to fellow servants, has led to the institution among the employes of many of the large industrial enterprises of the country, especially railways, of employes' mutual insurance societies. The plan consists briefly, of a payment by the employes of a certain amount from their wages into a common fund from which losses are paid. The organization of these societies has met with great encouragement from corporations employing a large number of men. In most cases, indeed, the employers have taken the initiative, and have organized these societies, contributing financial and moral support. Of their great usefulness there can be no doubt. They provide means for avoiding insurance organizations unworthy of confidence; they lessen the risks of insolvency and loss of premiums paid; they offer convenience, certainty, and regularity in making payments. They give a fixed and definite rate

of assessment and compensation, in place of the uncertainties of co-operative associations, lodges or brotherhoods, in which many members, though taxable on the death of a fellow member, evade or refuse to respond to assessment;¹ and, what is not less important, they secure a most effective and harmonious relationship between employer and employes. Mr. Charles Francis Adams, in an article in *Scribner's Magazine* for April, 1889, on the subject "Prevention of Railroad Strikes," says: "There ought to be connected with every large railroad organization certain funds, contributed partly by the company and partly by the voluntary action of employes, which would provide for hospital service, retiring pensions, sick pensions, and insurance against accident and death. Every man whose name has once been enrolled in the permanent employ of the company should be entitled to the benefit of these funds; and he should be deprived of it only by his own volutary act, or as the consequence of some misdemeanor proved before a tribunal. For a company like the Union Pacific to contribute \$100,000 a year to a hospital fund and retiring pension and insurance associations, would be a small matter, if the thing could be so arranged that the permanent employes themselves would contribute a like sum; and permanent employes only would contribute at all. Once let the growth of associations like these begin, and it proceeds with almost startling rapidity. At the end of ten years the accumulated capital on the basis of contribution suggested would probably amount to millions. Every man who was so fortunate as to become a permanent employe of the company would then be assured of provision in case of sickness or disability, and his family would be assured of it in case of his death."

§ 2. Compulsory Membership.—

A matter of much gravity pertaining to the organization of Employes Insurance Societies has been whether membership should be made compulsory upon the employes. It has been said to be a fact that neither abroad nor in this country have such societies been successful for a long term of years except where membership has been made compulsory. Dr. Barnard, in a pamphlet upon the subject "Railway Managers and Employes," in speaking of the Baltimore & Ohio Employes' Relief Association, says: "It was urged upon the management that they should use all proper means

1. "Relations of Railway Mana- Bernard.
gers and Employes," by Dr. W. T.

to induce membership on the part of those already in the service, and that the company should adopt such measures as would at least insure a thoughtful consideration of the benefits offered its employes. It was finally determined to adopt a modified compulsory policy, the ultimate effect of which would be to bring within the association every employe of the company. It is this compulsory feature which makes the association unique, and which guarantees its permanency and continuous success. It is undeniably within the strict bounds of propriety for the management of a railway or any other corporation to specify the conditions upon which it will employ, and to decline the services of those who show no disposition to protect themselves and families against the vicissitudes of the service they seek to enter. But to inaugurate such a policy at that particular time was to trespass upon very delicate ground, and required no little determination, for the railroads of the country were just recovering from the prostrating effects of the strike of 1877, and were cautiously re-establishing the *status quo*. This new departure from preconceived ideas and practices of dealing with labor was watched with great interest by railroad officials and others accustomed to dealing with the grave issues constantly arising from the employment of large bodies of men, and it was amid many predictions of failure that the announcement was made that the company would thereafter require as a condition precedent to employment that those seeking service should enter the insurance organization. It started a very lively discussion as to the merits of the scheme, and forced those to examine its provisions who would otherwise have passed them by with indifference." The great success which the association connected with the Baltimore & Ohio Railroad has achieved is an assurance that this plan was far sighted. Owing to a natural prejudice against it, however, on the part of employes, it has not been adopted to any great extent by other railway companies which maintain these societies.

In other countries insurance is frequently made compulsory by law. A royal commission has recently made a report in England favoring the principle. The German government has for several years been considering the subject, and all classes of wage workers are now required to secure protection against the accidents and changes of life and against their own improvidence. The system provides for three classes of insurance. The first is against sickness, and under this head each worker is charged from $1\frac{1}{4}$ to 2 per cent. of the average wage in his locality, two-thirds of the

charge being deducted by the employer from his wages and the other third being paid by the employer himself. This makes the contribution of the workmen equivalent to only about a cent and a half on the dollar of his wages, and for it he receives in case of sickness medical attendance and medicines and half pay for thirteen weeks, if he is sick so long, and if he has to enter a hospital his family receive one-half of his sick pay. The second branch covers insurance against accidents, and for this the employers are required to pay the premiums, which are proportioned to the number of men employed and the scale of risk. If the worker is completely disabled by accident he receives a pension of two-thirds of his wages, up to a certain amount, and an equitable proportion when practically disabled. In case of death a pension of 20 per cent. of his wages is allowed to the widow with a percentage to each child. The third branch is for insurance against old age and disability. The premiums vary from 1½d. to 4d. per week and are paid by the employers, who deduct one-half of the premium from the wages and pay the other half themselves. From this fund the workers when laid aside are paid small pensions, varying in proportion to their wages. One of the leading railway periodicals¹ in this country thus discusses the subject: "Legislation to compel men to make provision for the future is a recognition of the fact that a large majority of mankind is naturally improvident or else lacking in ability to accumulate money for a time of need, and it is certainly a kindly and merciful supervision by the country over its citizens. The same principle makes it the right and the duty of railway companies to insist that their employes engaged in an especially hazardous calling shall also lay aside in small periodical sums a portion of their wages which, in connection with a liberal contribution by the employing company, shall form a fund to meet the cases of necessity which invariably must occur. The great railway companies like the Pennsylvania, the Baltimore & Ohio, Chicago Burlington & Quincy, Union Pacific, and others which have established a relief fund for their employes have also contributed largely toward it, besides giving what is of the utmost importance in such an undertaking, the services of competent men to carry on the work of benevolence upon safe business principles. It is impossible to understand why some railway employes are opposed to these relief and aid associations in which the companies have part. The objection seems to be to the plan of deducting from the employe's wages

1. *Railway Age.*

each month the very small sum which is required to entitle him to the benefits of the organization ; but this is certainly the best, safest and cheapest way of obtaining the necessary funds, and it is a narrow and selfish view which a man takes of the noble work which these organizations contemplate and accomplish, when he objects to being taxed a pittance monthly because it has happened that he himself has not had need of the relief and his money has gone to help some less fortunate fellow. It is impossible to see any sound argument against the existence of railway aid and relief associations, and on the other hand it must be seen on serious consideration to be the duty of railway companies to make systematic and certain provision for the benefit of their employes in order to diminish the amount of suffering and sorrow incident to inevitable sickness, accident and death which are now experienced by so large a share of our railway employes and their families from lack of the relief which money thus provided would have given. * * * No man need lose his self respect by working for another and surrendering his right of voluntary action for an equivalent, and when one requirement of the employer is made solely for the benefit of the employed, and is admirable because it is free from the selfishness which influences most of the relations of men toward their fellows, it is a narrow and wholly unfair view which looks upon it as tyranny and seeks to excite opposition to it. The fact remains that employers of men, and especially railroad companies, are morally as well as legally responsible for the protection of their employes so far as possible against the calamities which their calling and often their own improvidence render them liable to. The question that ought to be asked in regard to the aid and relief associations which some of the railway companies have inaugurated is not "Don't you fear that it will encroach upon your American rights?" but "Is the result which it secures beneficial to you and your family?" We imagine that if the votes of the wives and children—and especially of the widows and fatherless, who, but for the provision which the company insurance methods have given them, would be penniless—were invited, they would be strongly in favor of any and all honest and safe protective measures which can be undertaken for those upon whom they are dependent. The history of voluntary insurance associations is full of financial wrecks resulting from mismanagement and dishonesty. The railway companies who have taken the matter of insurance in hand give to it not only money, but the services of experienced business men and the backing of their own solvency

They certainly can and do furnish insurance as cheaply as any brotherhood or other employes' organizations can, and at the same time they furnish far greater evidence of safety."

§ 3. Release of Employers from Liability for Injury.—

The benefit which employers derive from employes relief associations or insurance societies is sometimes made to include immunity from suits by the employes where they are injured by the negligence of the employer. The Baltimore & Ohio Railroad Company exacts from its employes, the members of the Baltimore & Ohio Employes Relief Association, an agreement not to claim the benefit of the relief fund if they prefer to sue for injuries received. This provision has been held to be reasonable and valid by the Supreme Court of Maryland.¹ "The occupation of many of the employes of a railroad is especially hazardous." Said the Court: "Accidents are constantly happening to them without default on the part of the company that employs them. In such cases they can have no redress except from an insurance. A compulsory insurance may at first blush seem harsh, but an insurance to some extent by general consent is deemed advisable, especially to those who have others dependent upon their daily labor. The provision against the double benefit and exacting the release is one not unreasonable for the company to make, interested as it is as a guarantor and in other ways. The employes have the right to decline the service of the company under such conditions, but if they accept it, knowing the conditions, they are bound by them, unless these conditions are so unreasonable that a court would pronounce them void." Nor is such a provision against public policy, as it simply puts a claimant to his election whether he will look to the railroad company or to the relief association for compensation.² It has been held, however, that a person is not estopped from claiming compensation from the railroad company for an injury resulting from a collision by having been previously compensated by the relief association for the injury which he then untruthfully alleged was caused by malaria, jaundice, constipation, etc., as the railroad company and the association are separate corporations, and, while the former guarantee all the contracts of the latter, yet the association funds were sufficient to meet all liabilities likely to arise.³ Where a member

1. *Fuller v. Relief Assoc.*, 67 Md. 433; s. c. 19 Am. & Eng. Corp. Cas. 43.

2. *Owens v. Baltimore & O. R. Co.*, 35 Fed. Rep. 715.

3. *Owens v. Baltimore & O. R. Co.*,

of such a relief association designated his mother in his application for membership as his beneficiary in case of his death, and upon his death his wife and child, the persons legally entitled to damages if the death was the result of negligence on the part of the railroad company, not releasing the railroad company, brought suit and recovered damages by compromise, it has been held that the mother could not recover the benefits from the relief association.¹

§ 4. London and North Western Insurance Society.—

The Insurance Society of the London and North Western Railway of England, being one of the largest and most prosperous of these associations in existence, may be taken as a fair example of the English method of conducting them. This society is not registered under the statutes relating to Friendly societies, but is established under special statutory authority obtained in the private acts relating to the railway company.

RULES.

1. This Society shall be called "The London and North Western Railway Insurance Society."

2. The offices of this Society shall be at Euston Station.

3. The object of this Society is to provide pecuniary relief in cases of temporary or permanent disablement, arising from accident occurring while in the discharge of duty, and also in all cases of death.

4. The members of this Society shall be persons in the service of the London and North Western Railway Company, or employed jointly in the service of the London and North Western and any other railway company, who are engaged at weekly wages. The servants engaged at weekly wages on the Dundalk Newry and Greenore Railway, and upon the Shropshire Union Canal, shall also be eligible to become members of this Society. Members transferred to the salary list who are, in consequence of age, precluded from joining the Superannuation Fund, shall be allowed to remain members of the Society, if they so elect.

5. The affairs of this Society shall be under the management of a Committee, composed of 12 members, to be nominated by the Delegates appointed to represent the members of the Society

35 Fed. Rep. 715.

67 Md. 433.

1. Fuller v. Baltimore & O. R. Co.,

in the manner provided for in Rules 16 and 17 ; and, in addition to the members so nominated, the London and North Western Board shall have the power of nominating three members of the Committee of Management, and from time to time may vary or re-appoint such members ; and such members are hereinafter termed the Company's nominees.

6. At the first meeting after their election, the Committee shall appoint a Chairman and a Vice-Chairman from their own body, who shall preside at all meetings of this Society during their term of office.

7. Five members of the Committee shall form a quorum, who, in the absence of the Chairman and Vice-Chairman, may choose a chairman for the occasion.

8. The Committee shall be at liberty to adopt from time to time any regulations, for their own guidance, or to facilitate the transaction of the business of the Society, provided such regulations are not inconsistent with the objects or rules of the Society.

9. The Trustees of the Society shall be the Chairman, Deputy Chairman, and Secretary of the London and North Western Railway Company for the time being, or any two of them. All property of the Society shall be vested in the Trustees for the time being, for the use and benefit of the Society and its members. No Trustee shall be liable to make good any deficiency which may arise or happen in the funds of the Society, nor be liable except for moneys which shall be actually received by him on account of the Society.

10. The Committee shall appoint a Secretary who shall be subject to removal at their discretion. The Committee shall fix the salary of the Secretary and any other officers of the Society ; and such salaries, as well as the other expenses of the management, shall be paid out of the funds of the Society.

11. The Secretary shall once in six months, at a time to be regulated by the Committee, and also at any time when required by a majority of the Trustees, or of the Committee, render an account of all moneys received and paid by him on account of the Society ; and shall also, when required by a majority of the Trustees for the time being, pay over all moneys, and assign and deliver all securities, papers, and property of the Society in his hands or custody, to such person as a majority of the Trustees shall appoint. He shall be responsible to the Trustees for all moneys paid into his hands on account of the Society, and such moneys

in his hands shall be a debt due from him to the Trustees for the time being. He shall give a bond to the Trustees for the faithful execution of his office.

12. The Committee shall have power to employ one or more Medical Officers.

13. A general meeting of delegates appointed to represent the members of the Society (as provided for in Rule 16) shall be held during the month of February in each year, at such place, day, and hour as may be fixed by the Committee, of which one month's notice shall be given. At such meetings the Committee shall present its report of proceedings during the previous year, and statement of accounts. All questions which may arise at such meetings shall be determined by a majority of the delegates then and there present, who, in the absence of the Chairman and Vice-Chairman of the Society, may elect a Chairman for the occasion. The Chairman, in addition to his own vote, shall, in case of an equality of votes, have a second or casting vote. All members of the Committee, including the Company's nominees, shall be summoned to attend the annual meetings of delegates.

14. The minutes of the proceedings shall be authenticated by the signature of the Chairman of the meeting.

15. The Secretary shall at any time convene a special general meeting of the delegates, or of the Committee of Management, upon a requisition signed by one-third of the delegates in the one case, and by one-third the members of the Committee in the other; but the Secretary may if he think fit, convene a special general meeting of the delegates, or a meeting of the Committee of Management, without any such requisition.

16. The members of the Society shall appoint delegates to represent them at the general meetings, such delegates to be elected amongst, and by, the members located in the several districts, as follows, it being understood that one of the five delegates for the Chester District shall be elected from, and by, the members in Ireland; but no candidate to be eligible to act as a delegate or member of the Committee of Management, unless he is a member of the Provident Society: [Then follows a list of the Districts and the delegates to which they are entitled.]

Meetings for the election of delegates are to be held by members in each respective district. The time for holding and mode of conducting the meetings, and authenticating their proceedings shall be regulated by the Committee of Management. The use of voting papers shall be permitted for those unable to attend the meetings.

17. The delegates shall in each District, at a time and in a manner to be regulated by the Committee of Management, nominate every two years one of their number as a member of the Committee of Management ; and any vacancy occurring in the Committee except in the company's nominees, shall be filled up in a similar manner, by the delegates for the district to which the retiring member belonged.

18. Three and two delegates respectively for each district shall retire alternately every two years by seniority, but shall be re-eligible, subject to the provisions contained in Rule 16. At the meetings for the election of delegates to fill up the vacancies thus caused, the names shall be recorded of at least four candidates in each district who have the largest number of votes next after those actually elected, and any vacancies for delegates that may arise prior to the next election, shall be filled up from such reserve list of names in the respective districts, and in the order in which they stand according to the number of votes.

19. The accounts of the Society shall be examined by two Auditors, who shall be elected at a general meeting of the delegates from amongst their number, one of them to retire alternately every year, but to be re-eligible.

20. The statement of accounts to be presented by the Committee to the annual general meeting of delegates shall be submitted to the Auditors with all proper vouchers, at least two weeks before the meeting ; and the Auditors may confirm the same, or report specially to the meeting respecting the same.

21. In the event of one of the Auditors dying, or leaving the service, or becoming incapable of acting, or declining to act, the candidate for the auditorship who, at the last election, had the largest number of votes next after the candidates actually elected, shall be entitled, until the next meeting, to take the place of the Auditor who has died, or left the service, or become incapacitated, or declined to act ; and in the event of both Auditors either dying, or leaving the service, or becoming incapacitated, or declining to act, then the next two candidates who had the largest number of votes after the candidates actually elected, shall take their places as Auditors until the next annual meeting of delegates ; but if at any annual meeting of delegates the Auditors shall be either elected or re-elected, without at least two other candidates having been voted for, then such annual meeting shall immediately proceed to the election of one or more reserve Auditors, to be ready to take the place or places of the acting Auditor or Audit-

ors in the event of one or both of them failing to act from any of the causes aforesaid ; but such reserve Auditor or Auditors shall, in the event of being required to act, have power to act only until the annual meeting of delegates next ensuing. In the event of the Auditors, or reserve Auditors, or either of them, being balloted out, they shall, so long as they are the acting Auditors, be *ex-officio* delegates, and be summoned to attend the general meetings of the Society, but without the power of voting.

22. Every person before becoming a member of the Society and entitled to benefit, shall receive a copy of the Rules, and sign a proposal, according to the form in the Appendix No. 1.

23. The following shall be the scales of payments and allowances :

For members who, before sustaining the personal injury in question, agree to accept the contribution to the funds of the Society by the London and North Western Railway Company, or other company or companies employing them, as mentioned in Rule 4, and the benefits to which they may become entitled under the rules of the Society, in satisfaction and in lieu of any claims they or their personal representatives, or persons entitled in case of their death, may, or would, otherwise have against such company or companies under, or by virtue of, the provisions of the Employers' Liability Act, 1880, or any act or acts amending the same, and enter into an agreement with the company or companies employing them according to the form in the Appendix No. 2, or to the like effect, the scale of payments and allowances in scale A.

For members who do not so agree, the scale of payments and allowances in scale B.

SCALE A.

1	2	3	4	5	6	7
Class.	Occupation.	Weekly Payments.	Sum insured in case of death arising from accident whilst in the discharge of duty and in the Company's service, and to be granted subject to the provisions of Rules No. 27 and 28.	Allowance in case of permanent disablement or incapacity to resume employment arising from accident whilst in the discharge of duty and in the Company's service, the same being professionally certified in such manner as may be required by the Committee, subject to the provisions of Rules Nos. 29 and 33.	Weekly allowance in case of temporary disablement by accident whilst in the discharge of duty and in the Company's service, the same being professionally certified in such manner as may be required by the Committee, and subject to the provisions of Rules Nos. 31, 32, and 33.	Sum insured in case of death from any cause not provided for in column No. 4, the deceased being a member of the Society at the time of his death, and having been a member during the six months immediately preceding such time of death.* This sum to be paid subject to the provisions of Rules Nos. 27 and 28.
		£. s. d.	£. s. d.	£. s. d.	s. d.	£. s. d.
1st	Passenger Guards and Brakemen	0 0 3	100 0 0	100 0 0	21 0	10 0 0
2nd	Goods and Passenger Porters, Policemen and Signalmen, Pointsmen, Gatekeepers, Ticket Collectors, Lorrymen, Carters, Shunters, Platelayers, Labourers, etc.	0 0 2	80 0 0	80 0 0	14 0	
3rd	Boys and Persons whose wages are under 12s. per week	0 0 1	40 0 0	40 0 0	7 0	

All servants not specified in Class 1, whose weekly wages amount to 25s. and upwards, to be allowed to join either the 1st or 2d Class, as they may elect. Members of the 1st and 2d Classes, whose weekly wages are reduced below 25s. and 12s. respectively, to be allowed to remain in the 1st or 2d Class, if they so elect.

* Note.—The Committee of Management to have the power of paying the allowance to the representatives of deceased members who have died within the period mentioned.

SCALE B.

1	2	3	4	5	6	7
Class.	Occupation.	Weekly Payments.	Sum insured in case of death arising from accident whilst in the discharge of duty and in the Company's service, and to be granted subject to the provisions of Rules Nos. 27 and 28.	Allowance in case of permanent disablement and incapacity to resume employment, arising from accident whilst in the discharge of duty and in the Company's service, the same being professionally certified in such manner as may be required by the Committee, and subject to the provisions of Rules Nos. 29 and 32.	Weekly allowance in case of temporary disablement by accident whilst in the discharge of duty and in the Company's service, the same being professionally certified in such manner as may be required by the Committee, and subject to the provisions of Rules Nos. 31, 32, and 33.	Sum insured in case of death from any cause not provided for in column No. 4, the deceased being a member of the Society at the time of his death, and having been a member during the six months immediately preceding such time of death.* This sum to be paid subject to the provisions of Rules Nos. 27 and 38.
		£. s. d.	£. s. d.	£. s. d.	First 26 Weeks. £. s. d.	Second 26 Weeks. £. s. d.
1st	Passenger Guards and Brakemen	0 0 3	40 0 0	35 0 0	18 0	9 0
2nd	Goods and Passenger Porters, Policemen, Pointmen, Gatekeepers, Ticket Collectors, Lorrymen, Carters, Shunters, Plate-layers, Labourers, etc.	0 0 2	35 0 0	35 0 0	13 0	6 0
3rd	Boys, and Persons whose wages are under 12s. per week	0 0 1	12 10 0	18 15 0	6 0	3 0
						10 0 0
						5 0 0

All servants not specifically described in the above Scale, whose weekly wages amount to 2s. and upwards—for example, Foremen, Shippers, Checkers, and Mates of the Steam Boats, Mechanics, &c.—to be allowed to join either the 1st or 2d Class, as they may elect.

Members of the 1st and 2nd Classes, whose weekly wages are reduced below 2s. and 1s. respectively, to be allowed to remain in the 1st or 2d Class, if they so elect.

*Note.—The Committee of Management to have the power of paying the allowance to the representatives of deceased members who have died within the period mentioned.

24. No person is insured beyond the sums for which he has paid the premium, even if he should meet with an accident when performing duties other than those of the class to which he belongs.

25. Claims for the death allowance, in urgent cases, to the extent of £5 to first and second class members, and £2 10s. to third class members, to be paid within three days of the date on which the medical certificate of death is received by the Committee-man of the district, provided the deceased had been a member six months prior to death.

26. The committee shall adopt such measures to secure the proper visitation of members on the allowance list as they may think expedient.

27. Before payment of any death allowance, the committee shall be entitled to call for and be furnished with such information and particulars as in their discretion they may think necessary to establish the validity of the claim of the person or persons claiming the allowance of the deceased member; and the committee are hereby empowered and authorized to pay such allowance to such person or persons as in their discretion they may think fit; it being always understood that the extent to which the committee shall be bound to the payment of death allowances, shall be—in the case of a married man, to his widow or children, or to his parents, or to any of them, in such proportions as the committee shall determine; and in the case of a single man, to his parents, brothers, or sisters, or any of them, in such proportions as aforesaid, unless the deceased members, married or single, have otherwise bequeathed the money, in which case it shall be paid to the person to whom it has been so bequeathed; but should there be no such surviving relatives, nor any such special bequest, then the funeral expenses only, to a reasonable amount, shall be defrayed by the Society. But every such case, and all other cases, shall be subject to the decision of the Committee; and such allowance having been once paid, neither the Committee nor the Society shall be liable to any further claim in respect thereof.

28. In the event of a member, who has been injured while on duty, and in the company's service, resuming work and afterwards dying from the effects of such injury, the Society shall be liable for the payment of the accidental death allowance, according to scale, col. 4, should the death occur within a period of six months from the date of his returning to duty; but subject to the discretion of the Committee, no further liability shall after

that interval attach to the Society, with regard to the payment of the accidental death allowance.

29. In all cases of permanent disablement, the Temporary Disablement Allowance shall be paid to members under Scale B for twenty-six weeks, and to members under Scale A for fifty-two weeks—the Permanent Disablement Allowance to be paid afterwards. All claims in respect of death, or permanent disablement, shall be paid in full, irrespective of any previous payments which may have been made under the head of Temporary Disablement Allowance.

30. Any person on receiving the Permanent Disablement Allowance shall cease to be a member of the Society, and no further payment shall be made at his death.

31. If three days are allowed to elapse before a claim is made by or on behalf of an injured person, he shall be liable to forfeit all benefit for the time which may elapse between the third day and the date upon which the claim is made, and no claim shall be recognized in any way by the Committee in respect of any accident which, through negligence, was not reported to the Secretary, within one calendar month from the date of the occurrence of such accident.

32. Subject to the Committee's decision, no allowance shall be granted to any member on account of any accident from the effects of which he shall have recovered, or resumed work before the date on which the application for the allowance shall have been forwarded to the Secretary; and all applications for allowances must be made upon the form prescribed by the Society, and must be certified by the station master, goods agent, or foreman, and also by the head of the department in which such member is employed. A medical certificate to be furnished at least once a month, or at any time the Committee or Secretary may require.*

33. Subject to the discretion of the Committee, no member shall be entitled to the payment of the Temporary or Permanent Disablement Allowance, with respect to any previous accident he may have incurred while on duty, and in the company's service, after he has resumed work for a period of six months.

34. If, in the opinion of the Committee, the accident is caused

*NOTE TO RULE 32.—Copies of medical certificates supplied for other societies will be accepted if certified by the officer drawing the allowance; or the original certificates will be returned to the members if required after copies have been taken at Euston.

willfully, or by gross negligence on the part of the insured, the insurance hereby effected may, as respects any claim arising out of that accident, be disallowed.

35. No member refusing to be examined by the Society's medical officer shall be entitled to any benefits from the Society during such refusal.

36. In every case of a person upon the Accident Register being known to have been out of his house or lodgings after 9 o'clock P. M., between the 1st April and the 30th September, and after 7 o'clock P. M., between the 1st October and the 31st March, the case will be discussed by the Committee, and unless a satisfactory explanation can be given, a fine not exceeding one week's allowance may be inflicted; also in the case of any such person being intoxicated, the allowance will be liable to forfeiture, at the discretion of the Committee.

37. Any member who is guilty of criminal misconduct shall forfeit all claim to the benefits of the Society, either in the shape of allowances or returned half premiums.

38. In cases where persons are more than once temporarily employed by the company, and the interval between their terms of engagement does not exceed 15 weeks, the whole period of their service, during which they have been members of the Society, shall be taken into account, in the event of their dying from natural causes, or from the result of accident incurred while not on duty, and their representatives shall in that case, and subject to the provisions contained in Rule 41, be entitled to the same benefits as if their respective terms of service had been continuous, provided such persons have not, upon the termination of their last engagement, received back the half premiums to which members who have joined the Society prior to the 1st January, 1877, are entitled upon their leaving it under Rule 42.

39. Members shall not be required to pay the premiums during their absence from duty owing to accident, sickness arising from natural causes, or at any other period during which their wages are stopped for more than three days in the same week.

40. In case any member shall at any time cease to be in the service of the London and North Western Railway Company, or in the joint service of the London and North Western and any other railway company, or in the service of the Dundalk Newry and Greenore Railway Company, or in the service of the Shropshire Union Canal Company, or shall be promoted so as to render him ineligible to remain a member of the Society, the insurance effected

on his behalf shall immediately thereupon be determined, and he shall cease to be a member of the Society.

Excepting, however, any person who is unable to work, owing to continued sickness from natural causes, or the result of accident incurred while not on duty ; when in any such case the Society will hold itself liable for the death allowance, according to scale and provisions contained in Rule 23, col. 7, for a period not exceeding 4 years from the time of his ceasing to work ; but should it at any time be shown to the satisfaction of the Committee that any such person has been able to work elsewhere during any part of that time, his claim shall immediately cease and determine.

41. Whenever any member of the Society is away from work owing to sickness from natural causes, or from accident incurred while not on duty, he shall send to the Secretary, at least once in every three months, a certificate stating where and how he is, signed by a registered medical practitioner, failing which all claim shall cease in the event of death ; the Society shall not, however, be liable to pay the death allowance after a period of four years has elapsed from the date of the accident or illness.

42. Any member *who joined the Society prior to the 1st of January, 1877*, shall, upon leaving the service, or being promoted, so as to render him ineligible to remain a member, receive back one-half of the premiums paid by him up to the 31st December, 1876, less any sums he may have received from the Society, up to the date of his leaving, provided his application for the amount is made within four calendar months from the date of his leaving the service or being promoted, unless in case of continued sickness, as referred to in Rule 40.

43. After the expiration of the year 1886, and of every five years thereafter, the condition of the fund shall, if required, either by the company, or by a resolution of the Delegates of the Society, be fully investigated and reported on by an Actuary, to be selected by the Committee of Management, and such Actuary shall propose such re-arrangement of the scale of payments and benefits as may seem desirable to him for its better working ; and he shall exhibit any deficiency which may be apparent in the funds, which deficiency shall be met in the manner provided for in Rule 44.

44. In case the funds of the Society shall be deemed by the Committee at any time to be insufficient to provide for the liabilities of the Society, it shall be competent to the Committee to levy not exceeding two additional weekly contributions or subscriptions, according to the scale, during a period of three months ;

such additional contributions or subscriptions to be paid on such dates as the Committee may appoint.

45. Investments of the Society's moneys may be made by the Trustees with the consent of the Committee, either in the public funds, or in the bonds or debenture stock of any railway company in the United Kingdom paying a dividend on their ordinary capital.

46. If any dispute shall arise between any member or the executors, administrators, nominee, or assigns of a member or any person claiming through or under a member or under the rules of the Society, and the Trustees, Secretary, or other officers, or the Committee, it shall be referred to arbitration, but the Committee of Management may, at their discretion, compromise any claim by the payment of such sum as may be agreed upon.

47. At the general meeting of Delegates three persons shall be annually named and elected as arbitrators, none of them being directly or indirectly beneficially interested in the funds of the Society. In each case of dispute the names of the arbitrators shall be written on pieces of paper and placed in a box, and the arbitrator whose name is first drawn out by the complaining party, or by some one nominated by the complaining party, shall be the arbitrator to decide the dispute. By consent, any other person or persons may be substituted or appointed as arbitrator or arbitrators. In any case, the decision of the arbitrator or arbitrators shall be final, and the party complaining shall be entitled to such sum or redress only as may be awarded. Every arbitrator may be paid a reasonable sum out of the funds of the Society.

48. None of the rules of the Society shall be modified, altered, or repealed, nor shall any new rule be made, except at a general meeting of delegates representing the members of this Society. All such modifications, alterations, or repeals of the existing rules, or introduction of new rules, shall require the approval of the London and North Western Board.

49. It shall be lawful for the Delegates at some meeting to be specially called for that purpose to dissolve the Society and to direct in what manner the funds and other property of the Society shall be appropriated or divided. Provided that the Society shall not be dissolved without the votes of consent to such dissolution and appropriation or division be obtained of five-sixths of the then existing members, to be ascertained in manner hereinafter mentioned, nor without the consent in writing of all persons, if any then receiving, or then entitled to receive, any sum or allowance from the funds, unless the claim of every such person be first duly

satisfied or adequate provision made for satisfying it ; and for the purpose of ascertaining the votes of such five-sixths of the members as aforesaid, every member shall be entitled to one vote.

50. All members shall give, in writing, at least six weeks' notice to the Secretary previous to the annual meetings, of any proposed alterations of rules, and of all subjects and complaints they may intend to bring forward, through their Delegates, in order that the Committee may look into the cases.

51. Wherever the word "Month" occurs in these rules, it shall signify calendar month.

APPENDIX I.

DECLARATION FORM.

This Form to be filled up and signed, and forwarded with the Wages Bills upon which the first premiums are entered for deduction, to the Head of the Department, for transmission to the Secretary of the Society.

..... *Department* *Station*

I request to be admitted a Member of the London and North Western Railway Insurance Society, under Scale....., and agree to be bound by the Rules thereof, a copy of which I have received. I authorize the deduction from my wages of the sum specified in the Rules, according to my position in the Company's service, for securing to myself, or to my representatives in case of my death, the benefits of the Society.

Signature

Date of Birth

Occupation

Date

NOTE.—If the person joining the Society cannot write, this Form to be read over to him, signed with his mark, and witnessed—the witness signing the Certificate below.

I certify that this Declaration Form }
has been read over to the person }
whose mark is made hereon } *Witness.*

APPENDIX II.

Form of Agreement to be signed by Members under Scale A, and by the person authorized to sign the same on behalf of the Company or Companies employing them.

MEMORANDUM OF AGREEMENT.

It is hereby mutually agreed between The (a) —————

Company (hereinafter referred to as the Employers) and (b) —————
(hereinafter referred to as the Employee) who has requested to be admitted a Member of the London and North Western Railway Insurance Society, under Scale A, as follows:—

The Employers agree to contribute to the Funds of the Society a sum equivalent to five-sixths of the premiums from time to time payable by the said Employee under the Rules of the said Society, such contribution to be paid to the Secretary of the said Society, whose receipt for the same shall be a sufficient discharge.

In consideration thereof the said Employee agrees to accept such contribution and any advantages to which he may be entitled under the Rules of the Society in satisfaction and in lieu of any claims which he or his personal representatives, or other person or persons entitled in case of his death, might or would otherwise have had under or by reason of the provisions of the Employers' Liability Act, 1880, or any Act or Acts amending the same.

As Witness our hands this ————— day of ————— 188 ———

Signed on behalf of the Employers —————

Signature of Member —————

————— Department. ————— Station.

(a) Here insert name of Company or Companies employing the Member.

(b) Here insert the name of the Member, and his address or occupation, or both.

NOTICE TO MEMBERS.

The Companies contribute sums equivalent to five-sixths of the premium payable by the Member in the case of Members who are willing to accept such contribution, and the consequent benefits under Rule 23 and Scale A, in the place of any claims they might possibly have against the Companies for personal injuries sustained while engaged in their service.

Members should make themselves acquainted with the provisions of Rules 31 and 32, so that in the event of accident, there may be no delay in sending in their applications for the Society's allowance.

Application for the temporary disablement allowance should be made not later than the day following that on which the member leaves duty, through the station master, goods agent, or foreman (from whom the prescribed form of claim can be obtained), according to the department in which the member is employed, who will transmit it to the Secretary of the Society.

A medical certificate must be furnished for all cases continuing beyond one month, and after that period the certificate must be renewed monthly, so long as the member continues to claim the Society's allowance.

In London, Birmingham, Manchester, Liverpool, and other towns, in which the Society has appointed medical men to examine members claiming allowance, the certificate of the appointed medical man must be obtained before the allowance can be paid, such certificate being renewed as often as may be necessary; but in these cases the members will not be required to furnish the ordinary monthly certificate before referred to. Orders for examination in such cases are supplied by the officers in charge.

Members who joined the Society prior to the 1st January, 1877, and who, upon leaving, are entitled under Rule 42 to the return of half the premiums they paid up to the 31st December, 1876, should apply for the same to the station master, goods agent, or foreman.

Special attention is directed to Rule 41, which provides that any member who, in consequence of sickness, is unable to work, shall send to the Secretary, at least once in three months, a certificate signed by a registered medical practitioner, stating where, and how he is, in order to entitle his representative to the allowance at his death. This certificate will not, however, be necessary so long as the member is receiving either the Insurance or Provident Society's allowance, the certificate required monthly being sufficient.

Copies of medical certificates supplied for other societies will be accepted if certified by the officer drawing the allowance, or the original certificates will be returned to the member if required after copies have been taken to Euston.

In cases of death arising from accident incurred whilst in the discharge of duty, or from other causes than that of accident on duty, full particulars, with name and address of representative claiming the Society's allowance, and a certificate of death, should at once be forwarded to the Committee-man for the district.

§ 5. London and North Western Provident and Pension Society.—

RULES.

1. This Society shall be called "The London and North Western Railway Provident and Pension Society."
2. The offices of this Society shall be at Euston Station.

3. The object of the Society shall be to provide the following benefits, as defined for the several classes of members by Rule 20:

- (a.) A weekly allowance in cases of temporary disablement for work.
- (b.) A retiring gratuity for old or disabled members in certain cases.
- (c.) A death allowance to the representatives of deceased members.
- (d.) An allowance towards the funeral expenses on the death of a member's wife.
- (e.) A pension to old or disabled members.

4. The members of the Society shall be persons engaged at weekly wages in the service of the London and North Western Railway Company ; but persons employed jointly at weekly wages by the London and North Western and any other railway company or companies may also become members of the Society by arrangement with such other company or companies. Persons engaged at weekly wages on the Dundalk Newry and Greenore Railway, and upon the Shropshire Union Canal, shall also be eligible to become members. Persons entering the service of the company, or of the joint companies, on or after 1st January, 1889, shall not be eligible to join the Society if over 45 years of age ; but those in the service prior to that date, and who elect to join the Society on or before 30th June, 1889 (*vide* Rule 48), may be admitted up to 50 years of age.* Members transferred from the wages to the salary list, who are ineligible for the Officer's Superannuation Fund, shall remain members of this Society.

5. By the company's rules, all persons regularly employed at weekly wages (except certain men in the locomotive department), who are not under 18 or over 45 years of age, or in the receipt of less than 12s. a week, will be required on their appointment or promotion to join the Society as 1st or 2d class members, as they may elect. Those who are under 18 years of age, or receiving less than 12s. a week, will join the Society as 3rd class members,

The payments referred to in the above Clauses (a), (b), (c), being restricted to cases of disablement or death arising from other causes than accident or duty.

*NOTE.—All members of the former L. & N. W. Railway Provident Society, or L. & N. W. Railway Pension Fund shall, however, be members of this Society, subject to provisions of Rules 20 and 48.

but they will be required upon attaining that age and rate of pay to become either 1st or 2d class members.*

6. The London and North Western Railway Company shall contribute, on account of pension benefits, £3,000 a year until the payments of 1st and 2nd class pension members at 1d. each per week amount to that sum, and then, in lieu of such contribution, they shall pay a sum equal to 1d. per week per each 1st and 2nd class member ; but in no case shall the contribution of the company exceed £6,000 per annum, unless a further sum should hereafter be voted by the proprietors.

In like manner the company shall contribute, on account of provident benefits, the sum of £800 per annum, in addition to the fines inflicted upon the staff in other departments than the locomotive.

7. The affairs of the Society shall be managed and regulated by the members of the Committee appointed from time to time to manage the affairs of the London and North Western Railway Insurance Society (hereinafter called the "Insurance Society") the company's nominees having a voice in the affairs of the Provident and Pension Society as members of the committee, in virtue of the company's contribution to the Society.

8. The Committee shall be at liberty to adopt from time to time, any regulations for their own guidance or to facilitate the transaction of the business of the Society, provided such regulations are not inconsistent with the objects or rules of the Society.

9. The Trustees of the Society shall be the Chairman, Deputy-Chairman, and Secretary of the London and North Western Railway Company for the time being, or any two of them. All property of the Society shall be vested in the Trustees for the time being, for the use and benefit of the Society and its members. No Trustee shall be liable to make good any deficiency which may arise or happen in the funds of the Society, nor be liable except for moneys which shall be actually received by him on account of the Society.

10. The Committee shall appoint a Secretary, who shall be subject to removal at their discretion. The Committee shall fix the

*Apprentices in the mechanical departments may be allowed to remain 3rd class members until the completion of the term of their apprenticeship, when, if they are retained in the service, they will be required to become either 1st or 2d class members, and pay back their increased premium as shown in scales A or B, pages 30 to 31, to the age of 18, provided they were then in receipt of 12s. a week.

salary of the Secretary and any other officers of the Society ; and such salaries, as well as the other expenses of the management, shall be paid out of the funds of the Society.

11. The Secretary shall once in six months, at a time to be regulated by the Committee, and also at any time when required by a majority of the Trustees, or of the Committee, render an account of all moneys received and paid by him on account of the Society ; and shall also, when required by a majority of the Trustees for the time being, pay over all moneys, and assign and deliver all securities, papers, and property of the Society in his hands or custody, to such person as a majority of the Trustees shall appoint. He shall be responsible to the Trustees for all moneys paid into his hands on account of the Society, and such moneys in his hands shall be a debt due from him to the Trustees for the time being. He shall give a bond to the Trustees for the faithful execution of his office.

12. The Committee shall have power to employ one or more medical officers.

13. The delegates appointed to represent the members of the Insurance Society shall also represent the members of this Society, the delegates being elected in the following districts according to the Insurance Society's rules: [Then follows a list of the districts and the delegates to which they are entitled.]

14. The general meeting of delegates representing the members of the Society (as provided for in Rule 13), shall be held during the month of February in each year, the place, day, and hour being regulated by the Committee, at which meeting the Committee shall present its report of proceedings during the previous year, and statement of accounts. All questions which may arise at such meetings shall be determined by a majority of the delegates then and there present. The Chairman, in addition to his own vote, shall, in case of an equality of votes, have a second or casting vote.

15. The minutes of the proceedings shall be authenticated by the signature of the Chairman of the meeting.

16. The Secretary shall at any time convene a special general meeting of the delegates, or of the Committee of Management, upon a requisition signed by one-third of the delegates in the one case, and by one-third of the members of the Committee in the other ; but the Secretary may, if he think fit, convene a special general meeting of the delegates, or a meeting of the Committee of Management, without any such requisition.

17. The accounts of the Society shall be examined by two Auditors, such Auditors being the same as those who are from time to time elected for the insurance society.

18. The statement of accounts to be presented by the Committee to the annual general meeting of delegates shall be submitted to the Auditors, with all proper vouchers, at least two weeks before the meeting ; and the Auditors may confirm the same, or report specially to the meeting respecting the same.

19. Every person before becoming a member of the Society, and entitled to benefit, shall receive a copy of the rules, and sign a proposal, according to the form in Appendix 2. Persons joining the Society in accordance with the company's regulations, and having passed the medical examination required by the company, and also former members of both the London and North Western Railway Provident Society and of the London and North Western Railway Pension Fund will not have to furnish a medical certificate, but in every other case, each person, before being admitted a member, shall produce a satisfactory medical certificate as to the state of his health. Old members of the London and North Western Railway Provident Society only, will be admitted to pension membership without a medical certificate, but old members of the pension fund only, must furnish a medical certificate of fitness before they can be admitted to Provident membership.

20. The following shall be the scale of payments and allowances :

(a.) For persons who join the Society after the 1st January, 1889, and who were not previous to that date members of the London and North Western Railway Provident Society or Pension Fund—as shown in *Appendix I., Scale A.*

(b.) For persons who were members of the London and North Western Railway Provident Society, and also of the London and North Western Railway Pension Fund, prior to those separate societies being merged into the present combined society ; and also for persons who were members of one of those societies only, and have become both Provident and Pension members since the establishment of the present combined society—as shown in *Appendix I., Scale B.*

(c.) For persons who were members of the London and North Western Railway Provident Society only, prior to

the establishment of the present combined society, and who have not subsequently become Pension members—as shown in *Appendix I., Scale C.*

- (d.) For persons who were members of the London and North Western Railway Pension Fund only, prior to the establishment of the present combined Society, and who have not subsequently become Provident members—as shown in *Appendix I., Scale D.*

21. Should any member who has received the sick allowance for a less period than fifty-two weeks, resume duty, and, on a renewal of sickness or from the result of an accident incurred while not on duty, again declare on the fund at any time or times within twelve months, the former period or periods during which he received the benefits of the Society shall be reckoned with the latter in the fifty-two weeks to which he will be entitled to allowance. When a member has received the allowance for fifty-two weeks his allowance shall cease, until he shall have resumed duty for a period of six months.

If, however, he does not resume duty, and is not entitled to a pension, his membership shall be considered to have ceased as soon as he shall have received the allowance for fifty-two weeks, and if he is entitled to a retiring gratuity, he shall only receive such a sum in respect thereof as his membership up to that date shall allow, it being understood that under this regulation he will not forfeit any benefit to which he may be entitled under Rules 22 and 35.

22. The Committee of Management are empowered, if they see fit, in exceptional cases of illness extending beyond fifty-two weeks, during which the sick allowance has been paid according to the scale, to grant a further sum not exceeding £10, either in one amount or in weekly allowances, at their discretion; it being understood that if the member does not eventually resume work, and is entitled to the retiring gratuity, the amount paid in excess of the fifty-two weeks' allowance under this rule shall be deducted therefrom.

23. The Committee of Management to have power to pay the retiring gratuity, shown in column 7 of scales A, B and C, either in one sum, or in weekly allowances; but in the event of the member dying before the whole amount of the allowance has been exhausted in weekly payments, the remainder to be paid to the representatives of the deceased member. (*Vide* Rule 34.)

24. In no case, except at the discretion of the Committee, shall

the Society be liable to pay the retiring gratuity while the member is in the receipt of the sick allowance and is entitled to draw it for a further period.

25. No member shall receive the sick allowance during absence from duty for a less period than two days.

26. The Committee shall adopt such measures to secure the proper visitation of members on the allowance list as they may think expedient.

27. If three days are allowed to elapse before a claim for the sick allowance is made by or on behalf of a sick or injured member, he shall be liable to forfeit all benefit up to the date on which the claim is made.

28. Subject to the Committee's decision, no allowance shall be granted to a member on account of any sickness or accident from the effects of which he shall have recovered or resumed work before the date upon which the application for the allowance shall have been forwarded to the Secretary ; and all applications for allowances must be made upon the form prescribed by the Society, and must be certified by the station master, goods agent, or foreman, and must be accompanied by the certificate of a registered medical practitioner, which certificate shall be renewed at least once a month, or at any time the Committee or Secretary may require, during such sickness.*

29. Should any member be disabled for work in consequence of immoral conduct, intemperance, or by accident through quarreling or fighting, or impair his mental faculties by drinking, or meet with an accident while under the influence of intoxicating liquors, in such case he shall not have any claim upon the Society's funds, except with regard to any pension to which he would be entitled if he has at that time attained the age of 65. All cases of dispute arising out of such alleged conduct to be decided by the Committee.

30. Any member who is guilty of criminal misconduct shall forfeit all claim to the benefits of the Society.

31. No member refusing to be examined by the Society's medical officer shall be entitled to any benefits from the Society during such refusal.

32. In every case of a person in the receipt of the sick allowance

*NOTE TO RULE 28.—Copies of medical certificates supplied for other Societies will be accepted if certified by the officer making up the pay bill ; or the original certificates will be returned to the member if required, after copies have been taken at Euston.

being known to have been out of his house or lodgings after nine o'clock P. M., between the 1st April and the 30th September, and after seven o'clock P. M., between the 1st October and the 31st March, the case will be discussed by the Committee, and unless a satisfactory explanation can be given, a fine not exceeding one week's allowance may be inflicted ; also, in the case of any such person being intoxicated the allowance will be liable to forfeiture, at the discretion of the Committee.

Any member changing his address whilst in receipt of sick allowance must give notice thereof to the sick visitor or Secretary within a week, and the consent of the sick visitor or Secretary must be obtained before any member receiving sick allowance removes to another part for change of air. The Committee may inflict a fine not exceeding one week's allowance in any case in which a member neglects to give this notice or obtain the necessary permission.

33. Members shall not be required to pay the provident portion of the premiums—viz., 4d. and 2d. per week, according to class—during their absence from duty owing to accident or sickness arising from natural causes, or at any other period during which their wages are stopped for more than three days in the same week ; but they shall, during all such periods, be required to pay the pension portion of the premiums—viz., 2d. and 1d. per week, according to class—together with any back premiums provided for by these rules.

If a member continues sick for a period of six months. the payment of pension premiums shall cease, unless he subsequently resumes work.

34. Before payment of any allowance at the death of a member, or the balance of the retiring gratuity provided for by Rule 23, the Committee shall be entitled to call for and be furnished with such information and particulars as in their discretion they may think necessary to establish the validity of the claim of the person or persons claiming the allowance of the deceased member ; and the Committee are hereby empowered and authorized to pay such allowance to such person or persons as in their discretion they may think fit ; it being always understood that the extent to which the Committee shall be bound to the payment of such allowance shall be—in the case of a married man, to his widow or children, or to his parents, or to any of them, in such proportions as the Committee shall determine ; and in the case of a single man, to his parents, brothers, or sisters, or any of them,

in such proportions as aforesaid, unless the deceased members, married or single, have otherwise bequeathed the money, in which case it shall be paid to the person to whom it has been so bequeathed ; but should there be no such surviving relatives, nor any such special bequest, then the funeral expenses only shall, if necessary, be defrayed by the Society. But every such case, and all other cases, shall be subject to the decision of the Committee ; and such allowance having been once paid, neither the Committee nor the Society shall be liable to any further claim in respect thereof.

35. Upon a member ceasing to be in the service of the London and North Western Railway Company, or in the joint service of the London and North Western and any other railway company, or in the service of the Dundalk Newry and Greenore Railway Company, or in the service of the Shropshire Union Canal Company, or upon being promoted so as to render him ineligible to remain a member of the Society, his membership shall immediately thereupon be determined, except as regards the payment of any pension to which he may be then entitled, and he shall cease to be a member of the Society, subject to the following provisions :—

- (a.) If a member shall, at the time of his quitting the service, be receiving, or be entitled to receive, sick allowance, he shall retain his position as a member of the Society, so far as payment of the sick allowance is concerned, until the termination of the illness in respect of which his right to sick allowance arose, not exceeding a period of fifty-two weeks.
- (b.) Any person drawing the pension allowance shall still be considered to be a member of the Society, so far as payment of the death allowance is concerned, and such allowance shall, at his decease, be paid to his representatives, in accordance with the provisions contained in Rule 34.
- (c.) In the case of persons not in receipt of pensions, who are unable to work owing to continued sickness or any other cause not provided for by the rules of the Insurance Society under the head of "Accident on Duty," the Society will hold itself liable for the death allowance for a period not exceeding four years from the time of his ceasing to work ; but should it at any time be shown to the satisfaction of the Committee that any such person has been able to work elsewhere during any part of that time, his claim shall immediately cease and determine.

36. After the expiration of every five years from the establishment of the combined Society, the condition of the Society shall, if required either by the company or by a resolution of the delegates of the Society, be fully investigated and reported on by an Actuary, to be selected by the Committee of Management; and such Actuary shall propose such re-arrangement of the scale of payments and benefits as may seem desirable to him for its better working; and he shall exhibit any deficiency which may be apparent in the funds, which deficiency shall be met in the manner provided for in Rule 37.

37. In case the funds of the Society shall be deemed by the Committee at any time to be insufficient to provide for the liabilities of the Society, it shall be competent for the Committee to levy not exceeding two additional weekly contributions or subscriptions, according to the scale, during a period of three months; such additional contributions or subscriptions to be paid on such dates as the Committee may appoint.

38. Investments of the Society's money may be made by the Trustees, with the consent of the Committee, either in the public funds, or in the bonds or debenture stock or guaranteed preference stock of any railway company in the United Kingdom paying a dividend on their ordinary capital.

39. If any dispute shall arise between any member or the executors, administrators, nominee, or assigns of a member, or any person claiming through or under a member or under the rules of the Society, and the Trustees, Secretary, or other officers, or the Committee, it shall be referred to arbitration.

40. The three persons annually named and elected as arbitrators for the Insurance Society shall also act as arbitrators for this Society. In each case of dispute the names of the arbitrators shall be written on pieces of paper and placed in a box, and the arbitrator whose name is first drawn out by the complaining party, or by some one nominated by the complaining party, shall be the arbitrator to decide the dispute. By consent, any other person or persons may be substituted or appointed as arbitrator or arbitrators.

Particulars of the case in dispute, with all necessary documentary evidence, shall be submitted in writing to the arbitrator, who will adjudicate thereon, unless he considers that other evidence is necessary or that the case is one in which it is requisite for the parties concerned to attend before him.

The decision of the arbitrator or arbitrators shall be final, and

the party complaining shall be entitled to such sum or redress only as may be awarded. Every arbitrator may be paid a reasonable sum out of the funds of the Society.

41. None of the rules of the Society shall be modified, altered, or repealed, nor shall any new rule be made, except at a general meeting of delegates representing the members of this Society. All such modifications, alterations, or repeals of the existing rules, or introduction of new rules, shall require the approval of the London and North Western Board.

42. It shall be lawful for the delegates, at some meeting to be specially called for that purpose, to dissolve the Society and to direct in what manner the funds and other property of the Society shall be appropriated or divided. Provided that the Society shall not be dissolved without the votes of consent to such dissolution and appropriation or division be obtained of five-sixths of the then existing members, to be ascertained in manner hereinafter mentioned, nor without the consent in writing of all persons, if any, then receiving, or then entitled to receive, any sum or allowance from the funds, unless the claim of every such person be first duly satisfied, or adequate provision made for satisfying it; and for the purpose of ascertaining the votes of such five-sixths of the members as aforesaid, every member shall be entitled to one vote.

43. All members shall give, in writing, at least six weeks' notice to the secretary, previous to the annual meetings, of any proposed alteration of rules and of all subjects and complaints they may intend to bring forward through their delegates, in order that the Committee may look into the cases.

44. Wherever the word "month" occurs in these rules it shall signify calendar month, and any reference to male members shall also include female members.

RULES RELATING TO PAYMENT OF PENSIONS.

45. Upon attaining the age of 65, a member who has contributed to the fund for a period of not less than 20 years (including the payments made to the London and North Western Railway Pension Fund, prior to the incorporation of that fund in the present combined Society) the premiums provided in Appendix I, Scales

NOTE.—Members entering the Society after the above date, and who have not previously been members of the L. & N. W. Provident Society or Pension Fund, will only receive a retiring gratuity if they become permanently disabled for work before attaining the age at which they would be entitled to a pension.

A, B, and D, shall be entitled, upon retiring from the company's service, to the following pensions :—

- (a.) Persons joining the Society after the 1st January, 1889, who will contribute according to the scale shown in Appendix I, Scale A :

	Weekly Pensions.
Class 1.....	12s.
Class 2.....	9s.

- (b.) Persons who were members of the London and North Western Railway Provident Society, and also of the London and North Western Railway Pension Fund, prior to those separate Societies being merged into the present combined Society ; also persons who were members of one of those Societies only, and have become both Provident and Pension members since the establishment of the present combined Society—who will contribute according to the scale shown in Appendix I, Scale B:

	Weekly Pensions.
Class 1.....	10s.
Class 2.....	7s.

which will be paid in addition to the retiring gratuity to which they would have been entitled under the rules of the former London and North Western Railway Provident Society (as shown in Appendix I, Scale B, Column 7).

They will, however, have the option, on attaining the prescribed pension age, of exchanging their right to a retiring gratuity for an increased pension, according to the following scale :—

Those members who would be entitled to a retiring gratuity of.....	£	s.	d.	{ Can exchange for a weekly pension of. }	1st Cl.		2nd Cl.	
					s.	d.	s.	d.
	12	10	0		10	6	7	6
Ditto do do	25	0	0	Ditto	11	0	8	0
Ditto do do	37	10	0	Ditto	11	6	8	6
Ditto do do	50	0	0	Ditto	12	0	9	0

- (c.) Persons who were members of the London and North Western Railway Pension Fund only, prior to the establishment of the present combined Society, and have not subsequently become provident members—who will contribute according to the scale shown in Appendix I, Scale D :

	Weekly Pensions.
Class 1.....	10s.
Class 2.....	7s.

46. Members between the ages of 60 and 65, upon their producing one or more medical certificates from a doctor or doctors approved by the Committee of Management, or such other evidence as shall satisfy the Committee that they are no longer able, through failing health or impaired energies, to continue at work, shall be entitled, upon leaving the service, to the pension, subject to the same conditions as laid down in Rule 45 for members retiring at the age of 65.

47. A person desiring to become a 1st class member must elect to do so either at the time he joins the Society, or when he is transferred from the 3rd class, in accordance with the provision contained in Rule 5, or upon his wages being at any subsequent period advanced from a sum below 25s. a week to a sum of 25s. a week or upwards. He shall not be permitted to join the higher class at any other time during his membership. No person shall, however, become a 1st class member whose age at the time of his promotion exceeds 40 years, except by the payment of an additional 1d. per week from his 40th birthday.

2nd Class members of the old pension fund may become 1st class members, if they so elect within six months from the 1st January, 1889, upon their paying the additional premium of 1d. per week back, to 40, if they are over that age.

48.* No person shall be admitted members of the Society who do not join it at the time of their entering the company's service, nor shall any members who are provident members only (under scale C) become pension members (under scale B), unless they pay in one sum back premiums at the rate of 4d. (1st class) or 2d. (2nd class) per week to the time of entry (the company also paying back a contribution at the rate of 1d. a week for the same period); such back payments, both on the part of the men and the company, not, however, to extend beyond the date at which the member attained the age of 18 years and his wages amounted to 12s. a week.

An exception to this rule to be made in favor of persons on the company's staff at the time of the present combined Society being

*NOTE.—The provisions of this Rule will not apply to former members of the L. & N. W. Ry. Provident Society, or the L. & N. W. Ry. Pension Fund. Members of the latter paying back premiums to their fortieth birthday, will continue to pay double or treble premiums until the arrears are paid off.

established, and who elect to join it, or being already provident members elect to become pension members also, within the first six months. Such persons, whose age does not exceed 40 years, to be admitted to the Society without being required to pay back premiums. Those whose age is over 40 years, but does not exceed 50 years to be admitted upon the condition of their paying an additional subscription of 1d. or 2d. a week, according to class, back to the age of 40; such back contributions to be made by the addition of 1d. or 2d. a week, according to class, to the ordinary premiums, until the back payments have been cleared off.

49. Persons joining the Society upon entering the company's service, or upon promotion, who are more than 40 years, and under 45 years of age, will be required to pay an additional subscription of 1d. or 2d. a week, according to class, back to the age of 40, such back contributions to be made by the addition of 1d. or 2d. a week to the ordinary premiums until the back payments have been cleared off.

50. Members who have paid the premiums shown in column 3 of Scales A, B and D in Appendix I., for a period of 20 years (including the payments made to the London and North Western Railway Pension Fund prior to the incorporation of that fund in the present combined Society) shall, upon leaving the service, from other causes than misconduct or voluntary resignation, before being entitled to a pension, receive back one-half the pension portion of the premiums of 2d. or 1d. per week, according to class, which they have paid into the fund, provided an application for the same be made by the member within a period of four months from the time of his leaving the service.

In the event, however, of such members leaving the service owing to continued sickness, or disablement from other causes than accident on duty, after having contributed pension premiums of 2d. or 1d. per week for a period of 20 years, and before attaining the age of 60, the Committee shall consider each case specially, and be empowered to allow such a sum, not exceeding the whole amount of the member's own contributions, towards a pension as, having regard to all the circumstances, they may consider just and equitable.

51. Members entitled to the pension to have the option of accepting either the pension or such a lump sum in commutation thereof as the Committee of Management may, upon the application of such members, agree to.

SCALE B.

1	2	3	4	5	6	7	8
Class.		Weekly Payments.	Sum insured in case of Temporary Disablement for work owing to Sickness or Accident while not in the discharge of duty, or from any cause not provided for in the Rules of the Insurance Society.	Sum insured in case of Death from causes than that provided for by the Rules of the Insurance Society under the heading of Accident on Duty, the deceased having been a Member during the six months immediately preceding his death. This sum to be paid subject to provisions of Rule 34.	Payment upon death of Member's wife towards funeral expenses, subject to approval of Committee in each case, and also to the condition that the Member has been six months in the Society, and that the death takes place during his membership.	Retiring Gratuity to be paid to Members in the event of their becoming disqualified for duty, either through the infirmity of age, or earlier, upon a medical certificate from a doctor approved by the Committee, or upon such other evidence as will satisfy the Committee of their incapacity for further work in the Company's service from any cause other than that met by the rules of the Insurance Society. (<i>Vide also Rules 39 and 34.</i>)†	Weekly Pensions payable after the age of 65 in accordance with Rule 45, or after the age of 60 if deemed qualified for work in accordance with Rule 46‡
1st	Members not under 18 years of age, and receiving Wages of 12s. per week and upwards	6d.	12s.	£ 10	£ 5	After 5 & not exceeding 10 years membership. £ s. 12 10 25	10s.
2d	Do. do.	5d.	12s.	10	5	After 10 & not exceeding 15 years membership. £ s. 12 10 25	7s.
3d	Members under 18 years of age, or receiving Wages of less than 12s. per week	2d.	6s.	5	5	After 15 & not exceeding 20 years membership. £ s. 0 37 10	—

Members of the 1st or and class, whose wages are reduced to a sum below 12s. per week, to be allowed to remain in the 1st or end class, if they so elect.

*NOTE.—The Committee of Management to have the power of paying the allowance to the representatives of deceased members who have died within the period mentioned.

† 1st and 2nd class members, after attaining the Pension age, can exchange their right to a Retiring Gratuity for an increased Pension, in accordance with Rule 45 (b).

It will be seen from column 7 and Clause b of Rule 45 that members under this Scale will be entitled to the Retiring Gratuity in addition to the lower Scale of Pensions shown in column 8.

SCALE C.

1	2	3	4	5	6	7
Class.			Sum insured in case of Temporary Dis- ablement for work owing to Sickness or to Accident in- curred while not in the discharge of duty, or from any cause not provided for in the Rules of the Insurance So- ciety.	Sum insured in case of Death from other causes than those provided for by the Rules of the Insur- ance Society under the head of Acci- dent on Duty, the deceased having been a Member dur- ing the six months immediately preced- ing his Death. *This sum to be paid subject to pro- visions of Rule 34.	Payment upon death of Member's wife towards funeral ex- penses, subject to approval of Com- mittee in each case, and also to the con- dition that the Mem- ber has been six months in the So- ciety, and that the death takes place during his member- ship.	Retiring Gratuity to be paid to Members in the event of their becoming disqualified for duty, either through the infirmity of age, or earlier, upon a medical certificate from a doctor approved by the Committee, or upon such other evidence as will satisfy the Committee of their incapacity for further work in the Company's service from any cause other than that met by the Rules of the Insurance Society. (<i>Vide also Rules 23 and 36</i>)
			Weekly Payments.			
1st	Members receiving Wages of 12s. per week and up- wards.		4d.	£10	A sum not ex- ceeding.	After 5 and not ex- ceeding 10 years' mem- ber- ship. £ a. £ a. £ a. 12 10 25 0 37 10
2nd	Members whose Wages are under 12s. per week.		2d.	£5		After 15 and not ex- ceeding 20 years' mem- ber- ship. £ a. £ a. £ a. 6 5 12 10 18 15

Members of the 1st class, whose wages are reduced to a sum below 12s. per week, to be allowed to remain in the 1st class, if they so elect.

*NOTE.—The Committee of Management to have the power of paying the allowance to the representatives of deceased members who have died within the period mentioned.

SCALE D.

1	2	3	4
Class.		Weekly Payments.	Weekly Pension, payable after the age of 65, in accordance with Rule 45 (c), or after the Age of 60 if disqualified for work, in accordance with Rule 46.
1st	Members not under 18 years of age and receiving wages of 12s. per week and upwards.	2d.	10s.
2nd		1d.	7s.

II.

DECLARATION FORM.

This form to be filled up and signed, and forwarded with the wages bills upon which the first premium is entered for deduction, to the head of the department, for transmission to the Secretary of the Society.

_____ *Department.* _____ *Station.*

I request to be admitted a _____ Class Member of the London and North Western Railway Provident and Pension Society, and agree to be bound by the Rules thereof, *a copy of which I have received.* I authorize the deduction from my wages of the sum specified in the Rules for securing to myself, or to my representatives in case of my death (where so provided), the benefits of the Society.

Signature _____

Date _____

Date of Birth _____

Amount of Weekly Wages _____

Date of first engagement by Company _____

NOTE.—If the person joining the Society cannot write, this Form to be read over to him, signed with his mark, and witnessed— the witness signing the certificate below.

I certify that this Declaration Form has been read over to the person whose mark is made hereon.

_____ *Witness.*

NOTICE TO MEMBERS.

Members are requested to make themselves acquainted with the provisions of Rules 27 and 28, so that, in the event of sickness, there may be no delay in sending in their applications for the Society's allowance.

Application for the weekly allowance must be made not later than the day following that on which the member leaves duty, through the station master, goods agent, or foreman (from whom the prescribed form of claim for the allowance can be obtained), according to the department in which the member is employed, who will transmit it to the Secretary of the Society; and the first application must be accompanied by a medical certificate, either upon the member's claim form or attached thereto; the certificate to be renewed each month so long as the member continues to claim the Society's allowance.

In London, Birmingham, Manchester, Liverpool, and other towns in which the Society has appointed medical men to examine members claiming allowance, the certificate of the appointed medical man must be obtained before the allowance can be paid, such certificate being renewed as often as may be necessary, but in these cases the members will not be required to furnish the ordinary monthly certificate before referred to. Orders for examination in such cases are supplied by the officers in charge.

Excepting at places referred to in the previous paragraph, copies of medical certificates supplied for other societies will be accepted, if certified by the officer making up the pay bill, or the original certificates will be returned to the member if required, after copies have been taken at Euston.

In cases of death of a member arising from other causes than that of accident on duty, or of the death of a member's wife, full particulars, with name and address of person claiming the Society's allowance, and a certificate of death, should at once be forwarded to the Committee-man for the district. Applications for the wife's death allowance must be accompanied by a certificate of marriage, which will be returned to the member.

§ 6. London and North Western Railway Superannuation Fund Association.—

DEED POLL.

TO ALL TO WHOM THESE PRESENTS SHALL COME, the several

persons whose names and seals are hereunto subscribed and affixed respectively, send greeting : WHEREAS by the London and North Western Railway Act, 1854, after a recital that a scheme for life insurance and superannuation of officers and servants of the London and North Western Railway Company, therein called the North Western Company, and hereinafter referred to as "The Company," had been approved by a Committee of such officers and servants, and adopted by the Directors of the Company to take effect from the thirty-first day of March, one thousand eight hundred and fifty-three, and that a copy of that scheme as so adopted was given in the schedule to the now reciting act annexed, and that it was expedient that provisions should be made for enabling that scheme to be carried out, it was with respect to the Superannuation Fund of the Company enacted, that subject to the provisions of the now reciting Act, the scheme for life insurance and superannuation of officers and servants of the company, of which a copy was given in the schedule to that Act, annexed, should be binding on the company and the officers and servants thereof, and might and should be carried out accordingly. And it was by the same Act provided that from time to time after the passing thereof, with the consent of at least four-fifths of the members from time to time contributing to the Superannuation Fund and of the Directors of the company, that scheme might be modified as those parties mutually agreed, and should, with such modifications, be binding and carried out. And it was by the same Act enacted that the procedure of the Committee from time to time appointed according to that scheme, should be regulated by themselves. And whereas the schedule referred to in the said in part recited Act of Parliament was in the words, letters, and figures, or to the purport and effect following (that is to say):—

SCHEME FOR SUPERANNUATION.

1st. All the salaried officers of the company who join the association, shall contribute thereto annually a sum equal to two and a half per cent. upon their actual salaries.

2nd. The London and North Western Railway Company contributing annually a sum equal to the aggregate contribution of the subscribing members.

3rd. In future all persons entering the service of the company shall, upon attaining the age of twenty years, be required to join the scheme on the above terms ; and no officer in the employment of the company shall hereafter be entitled to any superannuation

or other allowance from the Company other than that hereinafter set forth.

4th. After the expiration of five years from the establishment of this fund, and thenceforward once in every five years, its condition shall be fully investigated and reported on by two Actuaries, one to be named by the Board of Directors, and the other by the contributing members; and they shall, from time to time, propose any such re-arrangement of the scheme as may seem to them desirable for its better and more efficient working, and they shall also exhibit any deficiency which may be apparent in the fund, which deficiency shall be provided by a reduction of the benefits assured, and they shall also suggest the equitable appropriation or distribution of any surplus which may in like manner be apparent in the funds, and in case of any difference of opinion between the two so appointed Actuaries, an umpire shall be appointed, who shall be approved by the Board of Directors, whose decision shall be conclusive and binding.

5th. The objects of this association shall be to provide each contributing member of the railway company's salaried staff with a superannuation allowance, and with a payment of a sum at death, as hereinafter described.

- (a.) In the event of death of any contributing member within ten years from the date of his first contribution, there shall be paid to his family or representatives a sum equal to the whole amount of his own contributions, and that of the company on his behalf up to the time of his death.
- (b.) In the event of death any time after the expiration of ten years from the date of his first contribution, and before superannuation takes place, there shall be paid to his family or representatives a sum equal to, but not exceeding, one-half year's average salary.
- (c.) A superannuation allowance, according to the scale here following, to commence on any contributing member, attaining the age of sixty-five years, that is to say, after having paid contributions.

For 10 years and not exceeding 17 years, Three twelfths of average salary for that time.

" 17	"	" 24	"	Four-twelfths	"
" 24	"	" 31	"	Five-twelfths	"
" 31	"	" 38	"	Six-twelfths	"
" 38	"	" 45	"	Seven-twelfths	"
" 45 years and upwards...	..	...		Eight-twelfths	"

6th. Persons attaining the age of sixty-five shall not, however, be superannuated, or be entitled to any such allowance so long as they remain in the service of the company.

7th. Persons under the age of sixty-five, who shall have been contributing members for ten years or upwards, shall be entitled to be superannuated on the above scale, provided they are incapacitated by infirmity of body or mind (not the result of their own misconduct) from performing their usual duties : and provided also, that in all such cases satisfactory certificates and evidence of their actual state of health be produced to the Committee, who, with aid of medical advice, will decide on the fitness of each case for relief.

8th. Superannuation allowance granted to any person under the age of sixty-five under Rule 7, to cease if the party shall have recovered, and be again in a situation in which an income is earned, but every such case shall be specially considered by the Committee of Management, and equitably dealt with.

9th. The Committee to have the power, at the request of the party interested, and with the sanction of the Board of Directors, to pay to any person who shall have become a recipient on the fund, a sum, in one payment, equal to five years' annual allowance, under the scale in lieu of all other payments and allowances whatsoever, and thereon such person's connection with the scheme shall cease.

10th. Persons leaving the service of the company, in consequence of reduction or alterations in the establishment, to receive back the whole of their own contributions.

11th. Persons resigning the service of the company of their own accord, shall receive back one-half of their own contributions.

12th. Persons dismissed the service of the company for fraud or dishonesty, shall forfeit all contributions, and be deprived of any benefit whatever in the funds at the discretion of the Committee, with the approval of the Board.

13th. No person after the formation of the scheme to be admitted whose age shall exceed forty years, except under special arrangement with the Committee.

14th. All allowances shall be payable quarterly, on first January, first April, first July, and the first October in every year.

15th. All contributions shall be deducted *pro rata* from time to time, as the salaries are or may become payable.

16th. All moneys, constituting the fund of this association, shall be accumulated at interest in the hands and under the trust of

the company, at such average rates of interest as the said company shall, from time to time, be paying or allowing on their bonds ; the interest on the moneys accumulated to be ascertained and carried to the credit of the fund at the close of each half-year, and the average to be ascertained from the rates paid by the company for the half-year immediately preceding.

17th. The association shall be managed by a Committee to be from time to time appointed. Three members to be named by the Board of Directors, and three members to be named by the contributing members.

18th. And additional expenses entailed on the company in the working and management of the fund shall be borne by the moneys of the fund.

AND WHEREAS the persons whose respective names and seals are hereunto respectively subscribed and affixed, are members for the time being contributing to the said Superannuation Fund, and are at least four-fifths of the whole number of such members, and have agreed upon themselves that the said scheme shall be modified by, and that all the regulations for the constitution and management of the Superannuation Fund of the Company shall be embodied and comprised in this deed, subject to such power of modification from time to time hereafter, as given by the 27th section of the said act. AND WHEREAS the Board of Directors of the company have consented to such modifications of the said scheme as are contained in this deed, and have approved of this deed as properly embodying and comprising all the regulations for the constitution and management of the Superannuation Fund of the company. Now, it is hereby witnessed that the persons whose respective names and seals are hereunto subscribed and affixed declare as follows, that is to say :—

That, in the construction of every definition, clause, regulation, matter, and thing, hereinafter contained, the following words and expressions shall have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context, or by the nature of the subject matter (that is to say)—

“The Act” means the Act of Parliament, hereinbefore in part recited or stated.

“These Presents” means this deed, and any and every supplementary and other deed, duly executed to carry out the provisions of the act relating to the Superannuation Fund of the company.

“The Fund” means the fund for the time being provided under these presents.

"Salaried Officer" means officer or servant of the company remunerated by an annual salary in contradistinction to weekly wages, and to any form of remuneration other than an annual salary.

"The service" means the service of the company in the capacity of a salaried officer, and "Salaried officer" shall be deemed to include a salaried officer of the Shropshire Union Railways and Canal Company, and "the service" or "the service of the company" or "the servants of the company" shall be deemed to include the service and servants of the Shropshire Union Railways and Canal Company.

"The Contributing Members" means the salaried officers for the time being contributing to the fund, and does not include recipients in the fund.

"The Directors" means the Board of Directors for the time being of the company.

"The Committee" means the Committee for the time being, appointed under these presents.

"The Contributors' Committee-men" means the members of the Committee for the time being, appointed by the contributing members.

"The Directors' Committee-men" means the members of the Committee for the time being appointed by the directors.

"Directors' Actuary" means the Actuary for the time being, appointed under these presents by the directors, or (as the case may be), Actuary for the time being, appointed Directors' Actuary under these presents by the Actuary appointed by the contributing members.

"Contributors' Actuary" means Actuary for the time being, appointed under these presents by the contributing members, or (as the case may be), Actuary for the time being, appointed Contributors' Actuary under these presents by the Directors' Actuary.

"Third Actuary" means Actuary for the time being, appointed under these presents by the Directors' Actuary, and the Contributors' Actuary.

"The Actuaries" means the Directors' Actuary, the Contributors' Actuary, and the Third Actuary for the time being.

"The Auditors" } means respectively such respective officers
"The Secretary" } for the time being, appointed as provided in
these presents.

"Contributors' Auditor" means Auditor for the time being, appointed by the contributing members.

"Directors' Auditor" means Auditor for the time being, appointed by the directors.

"The Office" means the office of the company in Euston Square, or other, the principal place of business for the time being of the company.

"Ordinary Meeting" means an ordinary general meeting of the contributing members, duly called and constituted, and any adjourned holding thereof.

"Extraordinary Meeting" means an extraordinary general meeting of the contributing members, duly called and constituted, and any adjourned holding thereof.

"General Meeting" means an ordinary meeting, or an extraordinary meeting, and any adjourned holding thereof, respectively.

"Month" means calendar month.

"Words" importing the singular number only, include the plural number.

"Words" importing the plural number only, include the singular number.

That the contributing members shall form the Superannuation Fund Association of the London and North Western Railway Company.

That the said scheme, set forth in the said schedule to the Act, shall no longer be binding.

That all the provisions and regulations of these presents may from time to time be altered, as 4-5ths of the contributing members and the directors shall agree.

That any salaried officer, hereafter admitted into the service, whose age shall not exceed 40 years at the time of his admission, shall upon and from his admission to the service, and so long as he shall continue in the service, be a contributing member.

That the Committee shall have power from time to time, if they think fit, to make special and exceptional arrangements with any present or future salaried officer who was, or shall be upwards of 40 years old at the time of entering the service, as to the amount of contribution or benefit to be derived, or both, and to admit him to be a contributing member on the footing of such arrangements.

That every salaried officer, who was on the 1st day of April, 1853, and has since continued in the service, and who, previously to the 2nd day of April, 1854, commenced his contributions to the fund provided under the said scheme, or was previously to the same day admitted or recognized by the Committee, *de facto* acting in

the administration of such fund, as a contributor thereto, may and shall henceforward, so long as he continues in the service, be a contributing member, whatever his age, without special terms, and shall be bound in all respects by these presents.

That every salaried officer, who was on the 1st day of April, 1853, and has since continued in the service, but who has not, previously to the date of these presents, either contributed under the said scheme to the fund thereby created, or been admitted or recognized by any Committee, which has *de facto* acted in the administration of such fund, as a contributor thereto, may at any time hereafter apply in writing to the Committee, to be admitted as a contributing member, and if then not over 40 years of age, shall, on reasonably satisfying them that he is of sober and temperate habits, and not afflicted with any disease or disorder which tends to shorten life, be by them admitted accordingly, and although then upwards of 40 years of age, may in their discretion, on reasonably satisfying them as aforesaid, be by them admitted accordingly on the footing of any such special arrangements as aforesaid, and shall thenceforward, so long as he continues in the service, be a contributing member, and shall be bound in all respects by these presents.

That every salaried officer at present in the service, who has already begun to contribute to the said fund provided by the said scheme, or been admitted or recognized as a contributor thereto, by any Committee *de facto* acting in the administration thereof, having been at the time of such commencement of contributions, admission, or recognition, either not over the age of 40 years, or admitted to contribute on special terms as aforesaid, may and shall henceforward, so long as he continues in the service, be a contributing member, and shall be bound in all respects by these presents.

That, save as aforesaid, no servant of the company shall be bound, or entitled to be a contributing member, or be entitled to derive any benefit from the fund.

That for the purpose of these presents, the date of a contribution shall be the day when the payment of salary from which it is deducted became due, although such payment of salary may not be actually made till a later day.

That the fund shall be constituted and invested as follows (that is to say)—:

1st. Every contributing member shall contribute annually a sum equal to 2½ per cent. upon his actual salary, such contributions to be deducted *pro rata* from time to time, as the salaries are or may become payable.

2nd. The company shall contribute, at the date of every contribution of a contributing member in the service of that company, a sum equal thereto, and the Shropshire Union Railways and Canal Company shall contribute, at the date of every contribution of a contributing member in the service of that company, a sum equal thereto.

3rd. The fund shall be accumulated at interest in the hands and under the trust of the company, at such average rates of interest as the company shall from time to time be paying or allowing on their debenture bonds and mortgages, the interest on the moneys accumulated for the time being to be ascertained and carried to the credit of the fund at the close of every half-year (half-years being for this purpose reckoned from the first day of January to the thirtieth day of June, both inclusive, and from the first day of July to the thirty-first day of December, both inclusive), and the average to be ascertained from the rates paid by the company for the same half-year.

4th. The moneys constituting the fund already provided under the said scheme, so far as the same have not already been disposed of by the Committee or Committees, who have hitherto *de facto* acted in carrying out the said scheme, shall be part of the fund provided under these presents.

That persons now in the service of the company, who have contributed under the said scheme to the fund thereby provided, shall be entitled to the same benefits from the fund provided under these presents, and otherwise to the rights of contributing members, as if they had been respectively contributing members under these presents from the dates of their respective first contributions to the fund provided by the said scheme inclusive, and their respective contributions had been made directly to the fund provided under these presents, and that these presents shall for that purpose relate back accordingly.

That the fund shall be administered, and the affairs of the Association hereby, or by the force of the Act and these presents constituted shall be managed by the Committee.

That the Committee shall consist of the Directors' Committee-men and the Contributors' Committee-men.

That the procedure of the Committee as to quorum and manner of voting, and otherwise howsoever, shall from time to time be regulated by the Committee.

That the Committee shall decide on all claims made upon the fund.

That, whenever it shall be needful for the Committee to decide a question of fact, they shall be at liberty to act upon such proofs or presumptions as they shall deem satisfactory, whether the same shall be strictly legal proofs or legal presumptions or not.

That with respect to the benefits derivable from the fund but subject to the provisions of this deed, with respect to contributing members becoming, or having become such after attaining the age of 40 years, and not enjoying the exemption from special terms derived from having been in the service of the company on the first day of April, 1853, and having contributed to the fund provided by the said scheme, or been admitted or recognized as contributors thereto by the Committee *de facto* acting in the administration thereof, before the 2nd day of April, 1854, the following regulations shall be observed (that is to say) :—

1st. In the event of the death of any contributing member at any time before superannuation takes place, there shall be paid out of the fund to his legal personal representative or representatives, a sum equal to one half-year's average salary calculated over the whole term of his contribution, and if that sum be less in amount than the sum of his own and the company's contributions, or, in the case of a contributing member in the service of the Shropshire Union Railways and Canal Company, then the sum of his own and that company's contributions, there shall be further paid to his legal personal representative or representatives, the difference between such half-year's average salary and the sum of his own and the company's, or the Shropshire Union Railways and Canal Company's contributions, as the case may be.

2nd. In the event of the death of any member after superannuation has taken place, and before the total amount received by way of superannuation has reached the whole of the member's own contributions and those of the company on his behalf, there shall be further paid out of the fund, to his legal personal representative or representatives, a sum equal to the difference between such total contributions and the amount received for superannuation.

3rd. At any time during which, in either of the two last-mentioned cases, there shall be no legal personal representative of the deceased contributing member, it shall be lawful for the Committee, if they, in their absolute discretion, see fit, to cause any sum payable, not exceeding £50, to be paid to his widow and children (if any), or either or any of such persons without requiring a legal personal representative to be constituted, and any loss occasioned by payment being subsequently required, on the part

of a legal personal representative duly constituted, shall be borne by the fund.

4th. Every contributing member who shall have been such for ten years from the date of his first contribution inclusive, shall, on attaining the age of sixty years in the service of the company, and thereupon retiring from such service, or upon retiring from such service at any time after attaining the age of sixty years in such service, be entitled in the way of superannuation to an annual allowance for the remainder of his life, amounting to such proportion of the average salary received by him from the date of his first contribution inclusive, till his retirement from the service as hereinafter mentioned, with reference to the events next hereinafter particularized in the following table :

Years of Contribution completed.	Superannuation in per-centage of average Salary.	Years of Contribution completed.	Superannuation in per-centage of average Salary.	Years of Contribution completed.	Superannuation in per-centage of average Salary.	Years of Contribution completed.	Superannuation in per-centage of average Salary.
10	25	19	36	28	46	37	56
11	26	20	37	29	47	38	58
12	27	21	38	30	48	39	60
13	28	22	39	31	50	40	61
14	29	23	40	32	51	41	62
15	30	24	42	33	52	42	63
16	32	25	43	34	53	43	64
17	34	26	44	35	54	44	65
18	35	27	45	36	55	45	67

& upw'ds

All pensions are to be calculated upon the above scale, but they will be increased by one-twelfth or by eight and one-third per cent., in accordance with the following additional regulation prescribed by the Actuaries :

That an equitable appropriation or application of the surplus apparent in the fund, beyond the requirements likely to arise from the regulations at present in force and as further made by us, until the date of the next quinquennial investigation of the fund, be now made, in increasing by one-twelfth, or by eight and one-third per cent., the pensions of all members now incumbents on the fund or becoming so, within the five years ending with the date of the said investigation, and also in increasing by one-twelfth, or by eight and one-third per cent., all contingent pensions or superannuations to which the present members of the fund, and all new members who shall enter it prior to the date of the next quinquennial investigation, are or shall become prospectively entitled.

Thus, if he shall have been a contributing member for ten years

but less than eleven years from the date of his first contribution inclusive, 25 per cent. of such average salary, and so on; if he shall have been a contributing member for forty-five years or upwards from the date of his first contribution inclusive, 67 per cent. of such average salary, with the addition in all cases of one-twelfth to his pension; but no person shall be entitled to a superannuation allowance while remaining in the service of the company.

5th. Every contributing member, having been such for ten years or upwards from the date of his first contribution inclusive, who shall, while continuing in the service of the company, although under the age of sixty years, be incapacitated by infirmity of body or mind (not the result of his own misconduct) from performing the duties of his office, shall, from the time of the cesser or suspension of his salary by reason of such incapacity, but subject to the provisions hereinafter contained, be entitled to such superannuation allowance, as if after the same period of service, from the date of his first contribution inclusive, he had attained the age of sixty years at the time of such cesser or suspension, and had thereupon and at that time retired from the service of the company, provided, first, that certificates or other evidence of the actual state of health of such member shall be produced to the Committee, which shall be satisfactory to the Committee, who, with the aid of medical advice, shall decide on the fitness of each case for relief; and provided, secondly, that superannuation allowance granted to any person under the age of sixty years under this regulation, shall cease if the party shall have recovered, and be again in a situation in which an adequate income, having regard to his rank in the service, is or may and ought to be earned, either in the service of the company, in any capacity suited to his position in life, or in other employments suited to his position in life; and also, that it shall be in the discretion of the Committee to refuse to grant any allowance under this regulation in any case where the party applying, although incapacitated as aforesaid from performing the duties of the office actually held by him, is nevertheless in a situation in which an adequate income, having regard to his rank in the service, is or may and ought to be earned, either in the service of the company in any capacity suited to his position in life, or in other employments suited to his position in life. Provided, thirdly, that the Committee in their discretion, in any case falling within this regulation, may grant an allowance less than the full superannuation allowance, which is determined by the length of time during which the party applying has contributed,

and may from time to time increase or diminish such allowance, so that the full annual superannuation allowance shall not in any year be exceeded, and may, on the cesser of any superannuation allowance under this regulation, if they shall think it just to give to the person whose allowance shall cease any further benefit from his previous contribution, and may, if he shall return to the service of the company on the ceasing of such allowance, settle what (if any) benefit he shall derive from his previous contributions, and whether his contributions for the future shall be considered as commencing from that time or from any other time; and the Committee shall consider every application under this regulation in an equitable spirit; according to its own merits and circumstances. And if any member shall dispute any decision of the Committee under the 2nd or 3rd of the foregoing provisions, the matter in difference shall be referred to the decision of the barrister for the time being appointed to certify the rules of friendly societies, or if he shall decline to undertake the reference, then to any person whom the Recorder of London for the time being shall name, or if he shall decline to name any person, then to any person whom the Lord Mayor of London for the time being shall name, whose decision shall be final, and who shall be empowered to decide by whom the cost, charges, and expenses of, and attending the reference shall be paid, including the fee or compensation (if any) of the referee, the costs to be reckoned as between solicitor and client, or as between party and party, as the referee shall direct.

6th. The Committee shall be at liberty at the request of the party interested, and with the sanction of the Board of Directors, to pay to any person who shall have become a recipient on the fund, under either of the two foregoing regulations, a sum in one payment, not exceeding the amount of five years' payments of the annual allowance to which he is entitled in lieu of all other payments and allowances whatsoever, and therein such persons shall cease to have any claim upon the fund whatsoever.

7th. Any contributing member leaving the service of the Company in consequence of reductions or alterations in the establishment, or from his services being discontinued by the Company, or by the Shropshire Union Railways and Canal Company, as the case may be, from any cause other than fraud or dishonesty, shall be entitled to receive back from the fund the whole amount of his own contributions, and shall have no further claim upon the fund.

8th. Any contributing member retiring from the service of the Company before superannuation *bona fide* of his own accord, and not in order to escape dismissal for fraud or dishonesty, shall be

entitled to receive back from the fund one-half the amount of his own contributions, and shall have no further claim on the fund.

9th. Any contributing member dismissed the service of the Company for fraud or dishonesty, or retiring in order to escape dismissal for fraud or dishonesty, shall, at the discretion of the Committee, with the approval of the Directors, forfeit all or any part of his contributions, and lose all benefit from the fund, except such return (if any) as may at such discretion and with such approval as aforesaid, be made to him out of his own contributions.

10th. All superannuation allowances shall be payable quarterly, on the 1st day of January, the 1st day of April, the 1st day of July, and the 1st day of October in every year; an apportioned payment being made for any period less than a quarter of a year, elapsing between the commencement of superannuation and the quarterly day of payment next succeeding, or between the last quarterly day on which the allowance shall be payable, and the death of the recipient or cesser of the allowance as the case may be.

11th. Save as prescribed by the foregoing regulations, no contributing member shall have any claim upon the fund.

That, whenever a regulation or article is hereinafter referred to by number, the article hereinafter contained and so numbered shall be understood.

That the rules and regulations comprised in the following articles shall be observed, that is to say :—

1. There shall be three Directors' Committee-men and three Contributors' Committee-men.

2. The Directors' Committee-men shall from time to time be appointed by the Directors, and the qualifications, appointment, and retirement, from time to time, of the Directors' Committee-men shall be regulated from time to time by the Directors.

3. The Directors' Committee-men shall be, till the Directors shall otherwise appoint, Richard Moon, of Bevere, near Worcester, Theodore Woolman Rathbone, of Atherton Priory, Liverpool, and Hardman Earle, of Liverpool, Esquires.

4. The Contributors' Committee-men shall be, till the ordinary meeting of the year 1856, Henry Benjamin Hoy, of Euston Station, London, Charles Cooper, of Heaton Norris, near Manchester, and Edward Byron Noden, of Liverpool Road, Manchester.

5. An ordinary meeting for the election of officers shall be holden on the first Wednesday in the month of May in every year, commencing with the 1st day of April, at such place as the Committee shall from time to time appoint, and at such time of the

day or evening as the Committee shall from time to time appoint.

6. Extraordinary Meetings shall, from time to time, be called by the Committee, or such other persons as may be authorized in that behalf by these presents, and shall be holden at such time of the day or evening as the persons calling the same shall from time to time appoint.

7. Extraordinary meetings shall be holden at such place as the persons calling the same shall appoint, provided that in the case of extraordinary meetings called by persons other than the Committee, the place appointed shall be within five miles from the Royal Exchange in the City of London.

8. The Committee calling any general meeting, and any other persons calling an extraordinary meeting, respectively, shall, from time to time, give not less than seven days and not more than fifteen days' public notice, by advertisement in the *Times* or some other London morning newspaper, of the day, place, and hour appointed for the general meetings respectively; and when any adjournment is made for more than seven days, shall give at least four days' similar notice of the adjourned meeting, such notices to be respectively inclusive of the days of giving the same and the days of meeting.

9. Every general meeting shall, before proceeding to business, appoint a Chairman from among the contributing members present thereat.

10. Every election of a member of the Committee, Actuary, or Auditor, by any general meeting, shall be decided by a ballot held thereat, and all other questions by open voting of the members present thereat.

11. Every contributing member present, either in person or by proxy, in cases where proxies are allowed, shall have one, and only one vote.

12. A contributing member may, from time to time, appoint any other contributing member as his proxy in voting at any ballot.

13. Every instrument of proxy shall be in writing, in such form as hereinafter provided, and be signed by the contributing member appointing the proxy, and shall be left with the secretary, or at the office, at least forty-eight hours before the time for holding the general meeting whereat it is to be acted on.

14. The following shall be the form of the instrument of proxy :

I. A. B. _____ a contributing member of the Superannuation Fund Association of the London and North Western Railway Company, hereby appoint C. D. _____ another con-

tributing member of the same Association, to act as my proxy at the general meeting of the same Association, to be holden on the _____ day of _____ and at every adjournment thereof.

As witness my hand this _____ day of _____

(Signed) A. B.

15. Every such instrument of proxy shall be valid until it be revoked by writing under the hand of the appointing member, and left with the Secretary or at the office.

16. The person in the chair at a general meeting shall, in every case of an equality of votes on a ballot or otherwise, have an additional or casting vote.

17. Any general meeting may adjourn at pleasure to any later hour in the same day, or to any later day respectively fixed by the contributing members present thereat.

18. Any general meeting shall so adjourn if twenty contributing members at least be not present thereat in person within one hour after the time appointed for the holding thereof, or at the time of proceeding to any ballot to be held thereat.

19. Minutes of the proceedings of any general meeting shall thereat, or with all convenient speed thereafter, be recorded by the Secretary in a book kept for that purpose, and be signed by the person in the chair at such meeting; or in case of his default or incapacity, by any three or more of the contributing members present thereat, and such minutes when so recorded and signed shall, in the absence of proof of error therein, be considered as original proceedings.

20. Three Contributors' Committee-men shall, from time to time be elected at the ordinary meetings.

21. Every Contributors' Committee-man shall be a contributing member.

22. Every Contributors' Committee-man ceasing to be a contributing member shall *ipso facto* vacate his office.

23. The Contributors' Committee-men shall, from time to time, hold their offices until the proper day for holding the ordinary meeting next after their appointment.

24. Every retiring Contributors' Committee-man shall be eligible for immediate re-election; but a contributing member, not being such a retiring Committee-man, shall not be qualified to be elected a Contributors' Committee-man unless he give to the Secretary, or leave at the office, not less than fourteen days, and not more than one month before the day for election of Contributors' Committee-men, notice in writing, under his hand, of his willingness to be elected a member of the Committee.

25. A Contributors' Committee-man may at any time resign his office on giving twenty-one days' notice in writing of his intention to resign, to the Secretary, or leaving the same at the office.

26. Any occasional vacancy in the office of Contributors' Committee-man, shall be filled up by the continuing Contributors' Committee-men until the proper day for holding the next ordinary meeting.

27. The Committee may exercise its power during and notwithstanding any occasional vacancy or vacancies.

28. There shall be, from time to time, a Directors' Actuary, a Contributors' Actuary, and a third Actuary, and the appointment of the third Actuary shall be subject to the approval of the Directors.

29. A Directors' Actuary shall be appointed by the Directors as soon as conveniently may be after the termination of every successive period of five years, commencing the computation of the first such period with the first day of April, one thousand eight hundred and sixty-three.

30. A Contributors' Actuary shall, from time to time, be appointed by the contributing members at the ordinary meeting holden in the year next succeeding the expiration of every such period of five years.

31. If the Directors shall not appoint a Directors Actuary who shall accept the office within three months after the expiration of any such period of five years, the Contributors' Actuary appointed with reference to such period of five years, and not the Directors, shall appoint the Directors' Actuary with reference to such period of five years, such appointment to be made within four months from the expiration of such period of five years.

32. If the contributing members shall not appoint a Contributors' Actuary who shall accept the office within three months after the expiration of any such period of five years, the Directors' Actuary appointed with reference to such period of five years, and not the contributing members, shall appoint a Contributors' Actuary with reference to such period of five years, such appointment to be made within four months from the expiration of such period of five years.

33. Any occasional vacancy in the office of Directors' Actuary, occurring by reason of such Actuary dying, resigning, going to reside abroad, or becoming incapable to act, shall be filled up by the Directors within one month after such vacancy shall occur ; and in their default, then by the Contributors' Actuary, within twenty-one days from the expiration of such month.

34. Any occasional vacancy similarly occurring in the office of Contributors' Actuary, shall be filled up by the contributing members at an extraordinary meeting, to be holden for the purpose within two months after such vacancy shall occur ; and in their default, then by the Directors' Actuary, within twenty-one days from the expiration of such two months, and the Committee shall call an extraordinary meeting for the purposes of this regulation, for some day within one month after the occurrence of the vacancy.

35. The Directors' Actuary, and Contributors' Actuary shall appoint a third Actuary, approved by the Directors, within one month after the appointment of such one of them the Directors' Actuary and Contributors' Actuary, as shall be last appointed ; and if by their own default, or by reason of the Directors withholding their approval of any third Actuary appointed by them, there shall be no third Actuary appointed and approved by the Directors within such month, the Directors' Actuary and Contributors' Actuary shall vacate their office ; and if the Actuaries shall not make their report within three months' after the appointment of the third Actuary, or such further time as may be fixed by enlargement as hereinafter mentioned, the Actuaries shall vacate their offices, and in either of such cases, another Directors' Actuary and another Contributors' Actuary shall be appointed.

36. An extraordinary meeting shall be called by the Committee for some day within one month from the expiration of the month, or the period of three months, or enlarged period as the case may be, mentioned in the last article, for the purpose of electing a Contributors' Actuary.

37. In all other respects such proceedings shall be had, and times observed, in reference to the appointment of Directors' Actuary, Contributors' Actuary, and third Actuary, and the reporting of the Actuaries, and defaults therein respectively, as if the last day of the month, or of the period of three months, or enlarged period, as the case may be mentioned in the thirty-fifth Article, where the day of the expiration of the period of five years, with reference to which the appointment is required, and the extraordinary meeting, called according to the thirty-sixth Article, shall proceed in reference to adjournment in case of non-election and otherwise, as if it were an ordinary meeting at which a Contributors' Actuary was to be appointed, and a similar repetition of proceedings shall, from time to time, take place, till the Actuaries are duly appointed and their report has been made.

38. The Actuaries shall forthwith, on the appointment of the

third Actuary, fully investigate the condition of the Fund, and the Actuaries, or such two of them as shall agree, shall report thereon to the Committee, by writing under their hands, within three months after the appointment of the third Actuary, or within such enlarged period as the Actuaries, or any two of them, shall from time to time appoint and notify to the Committee, by writing under their hands.

39. The third Actuary shall not be a necessary party to the report if the other two Actuaries concur and he disagrees with them and generally he shall be on an equal footing in all respects with the other two Actuaries respectively ; and the supplying of an occasional vacancy in the office of the Directors' Actuary, or Contributors' Actuary, after the appointment of a third Actuary, shall not necessitate a new appointment of a third Actuary.

40. The Actuaries, or such two of them as shall agree, shall by their report direct such alterations (if any) in the regulations herein contained, with respect to the benefits derivable from the fund, and prescribe such additional regulations (if any) on the same subject, as it may seem to them desirable to prescribe for the better and more efficient working out of the intents of the association, and shall exhibit any deficiency which may be apparent in the fund to meet the requirements arising, or which may arise, under the regulations for the time in force, such deficiency to be met by a reduction of the benefits assured, and shall prescribe the proper and just manner of making such reduction, and shall also, if they think fit, prescribe an equitable appropriation or distribution of any surplus, which may in like manner be apparent in the fund beyond the requirements likely to arise under the regulations for the time in force.

41. The Actuaries, or such two of them as shall agree, may by their report make any suggestions without actually prescribing new regulations or alterations in the existing regulations ; but they shall by their report, or if they have omitted to do so by their report, then by writing under their hands after the delivery of their report, distinctly state what matters they prescribe, and what matters they only suggest.

42. The directions of any such report as aforesaid, may affect or vary the interests in the fund, as well of contributing members, and also of recipients on the fund for the time being, as of future contributing members and recipients ; but no recipient shall be called on to refund what he may have received under regulations previously existing.

43. The Actuaries may employ in their investigations, at the expense of the fund, all such accountants or other assistants as they may think proper.

44. The Actuaries, and all accountants or other assistants authorized in writing by them, or either of them, shall respectively have free access at all reasonable times to all the books and documents of, and relating to the association and fund, with full power to make copies and extracts thereof, and therefrom.

45. A Contributors' Auditor may be appointed at every ordinary meeting, if the contributing members personally present thereat shall so choose.

46. A Contributors' Auditor shall hold his office till the proper day for the ordinary meeting next ensuing his election.

47. A Directors' Auditor may, from time to time, be appointed by the Directors, if they shall so choose to hold office, so long as they shall from time to time resolve.

48. A Contributor's Auditor shall be a contributing member, and shall vacate his office *ipso facto* on ceasing to be so.

49. A Directors' Auditor may be either a Director or not, as the Directors shall from time to time resolve.

50. Whenever a general meeting fails to elect or appoint any Contributors' Committee-man or Actuary who ought to be elected or appointed thereat, the meeting shall stand adjourned to that day week, and if need be so on from week to week until the proper number of Contributors' Committee-men be elected, or (as the case may be) until an Actuary be appointed, subject nevertheless to the thirty-second article.

51. Whenever three Contributors' Committee-men shall not be elected on the proper day for holding an ordinary meeting, the retiring Contributors' Committee-men shall continue in office till such election take place.

52. Whenever a vacancy in the office of Contributors' Auditor shall occur by such Auditor dying, resigning, or ceasing to be a contributing member, the committee shall call an extraordinary meeting, for some day not less than seven days, nor more than one month after such vacancy shall have occurred, for the purpose of filling up such vacancy.

53. If the Committee shall fail to call any general meeting within the time prescribed for the purpose by these presents, any six of the contributing members may call an extraordinary meeting, and such extraordinary meeting shall proceed in the same manner as such general meeting which the Committee shall have failed to call ought to have done if called, and shall have all the powers of such last-mentioned general meeting, but not so as to enable the contributing members to appoint the Contributors' Actuary, after the power to

make such appointment has passed to the Directors' Actuary.

54. On being acquired on such behalf, the Directors shall from time to time give, or cause to be given, to the Committee or to any contributing member, and the Committee shall from time to time give, or cause to be given, to the Directors or to any contributing member, all such information as may be in their power respectively, as to whether any office under these presents is vacant or full ; and as to the happening or not of any event upon which the power of appointing an Actuary is to be transferred to other than the original hands, or upon which, or in consequence whereof, any general meeting ought to be or may be called.

55. In all cases (if any) in which there shall be a failure to appoint an Actuary or Actuaries, and no means are provided by these presents for making such appointment, the appointment may be made in such manner as an extraordinary meeting, to be called by the Committee, or by any six contributing members, or by the Directors (whichever shall first call such meeting), shall direct, subject to the approval of the Directors. And in all cases until the regulations alterable by Actuaries have been so altered by a valid report, the existing regulations for the time being shall remain in force.

56. The advertisement calling any extraordinary meeting shall particularize the business to be transacted thereat, and no business not so particularized shall be transacted thereat.

57. The business of the fund shall be conducted by means of the staff for the time being of the company, in such manner as shall, from time to time, be agreed between the Committee and the Directors.

58. The Committee shall, from time to time, appoint one of the staff of the Company to be Secretary, with the consent of the Directors as to the individual selected.

59. The remuneration of all services performed in carrying these presents into effect by the Actuaries, the Secretary, or others, shall be in the discretion of the Committee.

60. The Secretary shall keep the records, books, and papers relating to the Association and business thereof (except these presents) allowing such inspection as hereinafter provided.

61. He shall receive and report to the Committee all applications for allowances out of the fund, resignations and other matters to be brought under the consideration of the Committee.

62. He shall advertise all general meetings called by the Committee.

63. He shall record the minutes of the proceedings of all gen-

eral meetings, and of all meetings of the Committee, and the attendances of the members of the Committee, as well those appointed by the contributing members as those appointed by the Directors.

64. He shall perform such other duties with reference to carrying out these presents, as the Committee from time to time appoint.

65. A temporary substitute for the Secretary may at any time be appointed by the Committee at their pleasure.

66. The Committee shall cause full and true accounts to be kept of the fund, and of all sums of money expended under these presents by the Committee, and all persons employed by or under them, and of the matters and things for which such sums of money shall have been disbursed and paid, and shall cause full and true records to be kept of the times of commencement of membership, of the dates of first contributions, and of all chronological and other facts necessary or proper to be recorded, and shall also cause a register to be kept of the contributing members.

67. The books of the Committee shall be balanced thirty days at least before the day appointed for the ordinary meeting of one thousand eight hundred and fifty-six, and the day appointed for the ordinary meeting in every subsequent year.

68. Forthwith, on the books being so balanced, an exact balance sheet shall be made up, which shall exhibit a true statement of the fund, and the debts (if any) due and payable thereout at the date of making such balance sheet.

69. The books so balanced as aforesaid shall, for fourteen days previous to the day appointed for each ordinary meeting, and for thirty days thereafter, and every report of Actuaries shall at all times after the expiration of thirty days after the time of the same being presented to the Committee, and all other records and papers belonging to the association, shall at all times be open for the inspection of any contributing member or recipient or claimant upon the fund, or any person authorized by writing under the hand of any such member, recipient, or claimant, at the office, between the hours of ten and four in the daytime. But no such member, recipient, or claimant, or other person, shall be entitled at any time, except as aforesaid, to demand the inspection of such books, reports, records, or papers, unless in virtue of a written order, signed by two members of the Committee.

70. Any person at liberty to inspect, under the last article or the seventy-sixth article, may, at the time of such inspection, take

any copies or extracts of or from any documents inspected.

71. The Committee shall deliver to the Auditors the accounts and balance sheet for the year, thirty days at least before the day appointed for the ordinary meeting, with reference to which they are to be balanced and made out respectively, together with all means of vouching and verifying the same; and the Committee and Secretary shall give to the Auditors every assistance in their investigation.

72. It shall be the duty of the Auditors to receive such accounts and balance sheet, and to examine the same.

73. It shall be lawful for the Auditors to employ such accountants and other persons as they shall think proper at the expense of the fund, and they shall either make a special report on the said accounts, or simply confirm the same; and such report or confirmation shall be made and given to the Committee at least fourteen days before the day appointed for such ordinary meeting as last aforesaid.

74. The Committee shall cause to be produced to the contributing members assembled at each ordinary meeting the balance sheet and Auditors' report, and also the Actuary's report (if any such report, as last aforesaid, shall have been made since the last ordinary meeting), applicable to the period immediately preceding such meeting.

75. No general meeting shall have any powers, except such as are conferred upon it expressly or by implication by these presents.

76. These presents shall be kept by the Directors of the London and North Western Railway Company, who shall at all reasonable times, when thereunto required, allow every Director, Committee-man, or contributing member, or recipient, or claimant on the fund, or any person or persons, by such Director, Committee-man, member, recipient, or claimant, authorized in writing to inspect the same.

§ 7. Relief Department of Baltimore & Ohio Railroad Company.—

The Baltimore & Ohio Railroad Company has been more prominently identified with matters relating to the relief, pensioning and insurance of employes, than any other railroad company in this country. From 1882 to 1889 there existed the "Baltimore & Ohio Employes' Relief Association," specially incorporated under the act of the General Assembly of Maryland. At the instigation of certain labor organizations which alleged that the

railroad company made the organization a means of coercing its employes, the legislature repealed the charter of the Association. The railroad company then changed the whole system from that of a separate corporation to a department of the railroad company.

REGULATIONS.

GENERAL.

1. A department of the Company's service is hereby established, to be known as the "Relief Department."

Whenever the following words and titles occur in these regulations they will, unless otherwise specified, have the meaning herein defined:

"Company" will mean the Baltimore and Ohio Railroad Company.

"Department" will mean relief department.

"Committee" will mean the Committee of the President and Directors of the Company "on the Relief Department."

"Superintendent" will mean the Superintendent of the Relief Department.

"Service" will mean employment by the Baltimore & Ohio Railroad Company, or other corporation whose employes may participate in the privileges of the Relief Department.

2. The Company assumes general charge of the department; furnishes office room and furniture; gives the services of its officers and employes and the use of its facilities; becomes the custodian of its funds with full responsibility therefor, and guarantees the true and faithful performance of the obligations of the department in conformity with the regulations hereby established.

3. The relief department will be divided into three (3) sections to be known as the relief, savings and pension features, the accounts of which shall be kept separate.

The relief feature will afford relief to its members entitled thereto, when they are disabled by injury or sickness, and to their families in the event of their death.

The savings feature will afford opportunity to employes and their near relatives to deposit their savings and earn interest thereon, and enable employes only to borrow money at moderate rates of interest and on easy terms of repayment, for the purpose

of acquiring or improving a homestead, or freeing it from debt.

The pension feature will make provision for those employes, who, by reason of age or infirmity, are relieved or retire from the service of the Company.

4. The Company will contribute to the department the following amounts:

\$6,000 annually for the support of the relief feature, or when not needed for that feature, for the support of the pension feature.

\$25,000 annually for the support of the pension feature.

\$2,500 annually for the physical examination of employes.

5. The Committee will have charge of the operations of the department, and make any changes in these regulations which they may deem necessary. New regulations will be operative only when approved by the President and the Directors of the Company, and will then be binding upon the Company and the members of this department, who will be notified of the adoption of the same by publication thereof on the next monthly statement of benefits paid. The Committee will determine, on appeal from the Superintendent of the relief department, the rights of any member of the relief feature, depositor or borrower of the savings feature or pensioner, in reference to any claim made by such person and not allowed by the Superintendent, and their decision shall be final and conclusive. They will directly, or through a sub-committee of two or more of their members, pass upon applications for loans from the savings feature. They will report annually to the President and Directors the condition of the department, and will cause to be issued and posted in all shops and stations a monthly statement of benefits paid. They will also determine what disposition shall be made of the surplus funds of the relief feature at the close of each fiscal year; whether to decrease the next year's contributions; to increase the amount payable for natural death; to increase the efficiency of the pension feature, or otherwise promote the interest of those contributing thereto. They will direct all the investments for the several features of the department.

6. The President will, subject to the approval of the President and Directors, appoint a Superintendent, an Assistant Superintendent, an Actuary and a Chief Clerk of the relief department, and will fix the compensation of each.

The Superintendent will be the executive officer in charge of the department, and will report directly to the Committee, and

act as Secretary thereof. He shall have power to employ his subordinates and prescribe their duties, and employ and direct all contract and local surgeons and medical examiners, and generally to conduct the business of the department, subject to the approval and control of the Committee. All orders or instructions relating to the business of the department will be issued by or through him.

The Superintendent will also, through the medical examiners, ascertain and report to the President the sanitary condition of shops, stations, yards and other portions of the Company's property and the surroundings of its employes, and likewise all facts affecting the comfort, safety and welfare of the employes and passengers.

The Superintendent will be assisted by an Assistant Superintendent, who shall perform all the duties of the Superintendent in his absence, and such others as may from time to time be assigned him by the Superintendent.

The Chief Clerk shall have special charge of the receipts and disbursements of the department, and accounts connected therewith.

All checks or orders for the payment of moneys shall be signed by the Superintendent, or the Assistant Superintendent in the absence or incapacity of the Superintendent, and be countersigned by the Chief Clerk.

7. The fiscal year of the department will begin with the first day of October of each year.

8. Other corporations associated in interest with this Company, or having harmonious relations therewith, may secure to themselves and their employes the advantages offered by this department by agreement between the respective Companies, but only so as to always protect the employes of this Company from any additional burdens by reason of the admission of the employes of such other Company.

9. All moneys and securities of the department, with the exception of the mortgages made to secure loans from the savings feature, shall be entrusted to the official custody of the Treasurer of the Company, to be held subject to proper requisitions. All such securities will be held in the name of the Company "in trust for the relief department."

Interest at the rate of four per cent. per annum will be paid on the monthly balances of cash deposited with the Treasurer for the several features of this department, including in such balances the

amount of checks not presented for payment or unclaimed on the last day of the month.

10. The officers, agents and employes of the Company shall co-operate with the department in promoting its objects, and, as a part of their duties, conform to these regulations.

In indicating the relations to the service of employes relieved of employment and pay therein, the following terms shall be used :

“Resigned” for those voluntarily leaving the service.

“Discharged” for those permanently relieved for cause.

“Furloughed” for those temporarily relieved without fault on their part.

“Suspended” for those temporarily relieved as a penalty for slight offences.

11. All claims of members of the relief feature, their beneficiaries or other representatives, or of depositors or borrowers of the savings feature, or of pensioners, arising under these regulations, and all questions or controversies of whatsoever character arising in any manner, or between any parties or persons, in connection with the relief department or the operation thereof, whether as to the construction of language or meaning of the regulations, or as to any writing, decision, instruction or acts in connection therewith, shall be submitted to the determination of the Superintendent of the relief department, whose decision shall be final and conclusive thereof, subject to the right of appeal in writing to the Committee directly or through the Advisory Committee within thirty days after notice to the parties interested of the decision.

When an appeal is taken to the Committee, it shall be heard by them without further notice at their next stated meeting, or at such future meeting or time as they may designate, and shall be determined by vote of the majority of a quorum, or of any other number not less than a quorum of the members present, and the decision arrived at thereon by the Committee shall be final and conclusive upon all parties, without exception or appeal.

12. There shall be two Advisory Committees, one for the lines and divisions east of the Ohio River, and one for the lines and divisions west of the Ohio River.

Each Committee shall consist of seven members, including the Chairman. The General Manager east of the Ohio River shall be, *ex officio*, Chairman of one, and the General Manager west of the Ohio River shall be, *ex officio*, Chairman of the other. The other members of each Committee shall be elected annually by the members of the relief feature employed on the several lines or divisions

east and west of the Ohio River respectively, from among themselves—two by the vote of the members employed in the machinery department, two by the vote of those employed in the transportation department, and two by the vote of those employed in the road department.

The election shall be by ballot, each member being entitled to one vote for the representative or representatives of the department in which he is employed. The ballots shall be returned to the General Manager, and by him forwarded to the Superintendent of the relief department, to be counted by tellers appointed by the Committee on the relief department. The tellers shall ascertain and decide that the person casting each ballot is a member of the relief feature entitled to cast the same. The result ascertained by the tellers shall be reported by the Superintendent to the General Managers, who shall notify the members elected.

The first election shall be held during the month of April, 1889, and the members then elected shall constitute the respective Committees from the date of their election until the first day of October, 1889. On the first Monday of September in each year, beginning with the year 1889, the members of said respective Committee shall, in like manner, be elected for the year beginning the first day of October following. Each Committee shall have power to fill vacancies in its number arising from any cause, provided that the representation of the three departments named shall always be equal, and shall select its Secretary out of its own number.

Any member of the relief feature or pensioner who feels aggrieved by any decision or order of the Superintendent, or by the application to his case of any of the regulations of the department, may within thirty (30) days make his complaint in writing to the Advisory Committee for the territory in which he is employed.

The Advisory Committee shall receive such complaint, examine into and pass upon the same; and if they deem the same to be well founded, shall report the matter fully in writing to the Committee on the relief department, with their recommendation in the premises. The Committee shall dispose of the matter so appealed to them in the manner provided in Regulation No. 11 with reference to appeals.

The Advisory Committee will also, from time to time, make to the Committee such recommendations in reference to the business of the department as they may deem advisable, and will examine into and report on all matters referred to them by the Committee. Each Advisory Committee shall hold regular meetings every three

months. Special meetings may be called at any time by the Chairman.

RELIEF FEATURE.

MEMBERSHIP.

13. The word "member" in the following regulations will mean any person entitled to participate in any of the forms of relief afforded by the relief feature.

14. Membership in this feature will be voluntary to the following classes :

- (a.) Officials receiving an annual compensation of over \$2,000.
- (b.) Employees who entered the service prior to May 1, 1880, and who have been continuously therein since that date ; except members of the Baltimore and Ohio Employees Relief Association.
- (c.) Clerks, telegraphers and others of similar employment who are in no degree exposed to accidents in the service.
- (d.) Agents receiving commissions only and employees receiving \$20 per month or less.

All of these persons may acquire membership in either the natural death or sick benefit, or both, upon compliance with the conditions thereto attaching. Having once become members, they must continue so while in the service.

All persons employed in the service, on the first day of April, 1889, with the exceptions noted above, and all persons thereafter entering the service or promoted therein, must, as a condition of employment or advancement, become full members of this feature, entitled to all its benefits, before being permitted to go on duty.

The above regulations apply to all classes of employes, whether denominated regular, extra, temporary or construction force, and to those on probation or learning their duties, although not then receiving pay from the Company.

The only exceptions to this rule will be in cases of great emergency, when the services of the persons are absolutely necessary on short notice. In such cases men may be allowed to work not more than two (2) days without becoming members.

No person over 45 years of age, or who is not in good physical health—to be determined and certified by a medical examiner of this department, will be admitted to membership, except those who were members of the Baltimore and Ohio Employees' Relief Association on the 31st day of March, 1889. This requirement is abso-

lute, and exceptions will be made only by the President in writing, a copy of which will be filed in the relief department.

15. To entitle an employe to participate in any of the forms of relief afforded by the relief feature, he must execute an application in one of the forms prescribed in regulation 17, and pass a satisfactory medical examination. This application, when accepted by the Superintendent, will constitute a contract of employment between the applicant and the Company, binding each to be governed by the terms of the application and these regulations. The evidence of the acceptance and approval of the application will be the issuance to the applicant of a certificate of membership, containing a copy of the application and the regulations of the relief department then in force.

Duplicate certificates will be issued only upon the payment of twenty-five (25) cents.

16. Immediately upon the employment of any person for the service, who is under these regulations required to become a member of the relief feature, notice in writing of such employment must be sent to the Superintendent of the relief department and to the medical examiner of the district in which the person is employed. The latter will, as soon thereafter as possible, make the necessary examination, advise the applicant and the employing official of the result, and, if it is favorable, complete and forward the application. If unfavorable, the application will be forwarded to the Superintendent of the relief department, showing fully the cause of rejection. In such case the employe will immediately be relieved from the service.

17. Applications for full membership will be substantially in the following form :

BALTIMORE AND OHIO RAILROAD COMPANY.

RELIEF DEPARTMENT.

APPLICATION FOR FULL MEMBERSHIP IN THE RELIEF FEATURE.

To the Superintendent of the Relief Department :

I _____ of _____ in the County of _____ and State of _____, desiring to be employed in the service of the Baltimore and Ohio Railroad Company as _____ in the _____ Department, _____ Division, do hereby, as one of the conditions of such employment, apply for membership in the relief feature, and consent and agree to be bound by all the regulations of the relief department, now in force and by any other regulations of said department, hereafter adopted, applicable to the relief feature; for which

regulations now in force reference is hereby had to any copy of the last edition of the book of regulations of said department issued by the Superintendent.

I also agree that the said Company by its proper agents and in the manner provided in said regulations, shall apply monthly in advance from the first wages earned by me under said employment, in each calendar month, sums at the rate of _____ per month as a contribution to the relief feature of said department, for the purpose of securing the benefits provided by said regulations for a member of Class _____ to myself, or in the event of my death, to _____ or to whoever I may hereafter from time to time designate in writing by way of substitution, with the written consent of the Superintendent ; or if no such beneficiary be then living, to my next of kin (as determined by the laws of the State of Maryland) in accordance with Regulation No. 18, subject to all the provisions and requirements of said regulations.

** I expressly stipulate that my marriage shall ipso facto have the effect to substitute my wife in the place and stead of the beneficiary named above to receive said benefits in the event of my death, if she be then living.*

I further agree that this application when accepted by the Superintendent shall constitute a contract between myself and the said Company as a condition of my employment by the Company, governed in its construction and effect by the laws of the State of Maryland, and as such be an irrevocable power and authority to said Company to appropriate the above amounts from my wages and apply the same as aforesaid, and shall constitute an appropriation and assignment in advance to the said Company in trust for the purpose, of the relief feature of such portions of my wages, which assignment shall have precedence over any other assignment by me of my wages or of any claim upon them on account of liabilities incurred by me.

I further agree that in consideration of the contributions of said Company to the relief department and of the guarantee by it of the payment of the benefits aforesaid, the acceptance of benefits from the said relief feature for injury or death shall operate as a release of all claims against said Company or any company operating its branches or divisions for damages by reason of such injury or death, which could be made by or through me ; and that the Superintendent may require as a condition precedent to the payment of such benefits that all acts by him deemed appropriate or necessary to effect the full release and discharge of said companies from all such claims, be done by those who might bring suit for damages by reason of such injury or death ; and also that the bringing of such a suit by me, my beneficiary or legal representative or for the use of my beneficiary alone or with others or the payment by any of the companies aforesaid of damages for such injury or death recovered in any suit or determined by compromise, or any costs incurred therein, shall operate as a release in full to the relief department of all claims by reason of my membership therein.

I also agree for myself and those claiming through me, to be specially

* The Medical Examiner will in the cases of applicants already married, erase this paragraph.

bound by Regulation No. 11, providing for the final and conclusive settlement of all disputes by reference to the Superintendent of the relief department; and an appeal from his decision to the Committee on the relief department.

I understand and agree that this application when accepted by the Superintendent, shall constitute a contract between me and the said Company, by which my rights as a member of said relief feature and as an employe of said Company shall be determined as to all matters within its scope; that each of the statements herein contained and each of my answers to the questions asked by the Medical Examiner and hereto annexed shall constitute a warranty by me, the truth whereof shall be a condition of payment of any of the benefits aforesaid.

I hereby certify that I am _____ years of age, am correct and temperate in my habits and have no injury or disease, constitutional or other, which will tend to shorten my life; am now in good health and able to earn a livelihood. In witness whereof, I have signed these presents at _____ in the State of _____, this _____ day of _____ 18____.

Witness: _____.

The foregoing application is accepted at the office of the Superintendent of the relief department in Baltimore City, Maryland, this _____ day of _____ 18____.

Superintendent of the Relief Department.

Applications for additional natural death benefit or for natural death benefit only will be substantially in the following form:

BALTIMORE AND OHIO RAILROAD COMPANY.

RELIEF DEPARTMENT,

APPLICATION FOR NATURAL DEATH BENEFIT:

To the Superintendent of the Relief Department:

I _____ of _____ in the County of _____ State of _____, employed in the service of the Baltimore and Ohio Railroad Company, as _____, in the _____ Department Division, do hereby, by virtue of such employment, apply for membership in the relief feature for the natural death benefit only, and consent and agree to be bound by all the regulations of the relief department now in force and by any other regulation of said department hereafter adopted, applicable to the relief feature; for which regulations now in force reference is hereby had to any copy of the last edition of the book of regulations of said department issued by the Superintendent.

I also agree that the said Company by its proper agents and in the manner provided in said regulations shall apply monthly in advance from the first wages earned by me under said employment, in each calendar month, sums at the rate of _____ per month as a contribution to the relief fea-

ture of said department (in addition to any amounts I may have heretofore authorized said Company to so apply) for the purpose of securing _____ times the natural death benefit of the lowest class provided by said regulations, in the event of my death to _____, or whoever I may hereafter from time to time designate in writing by way of substitution, with the written consent of the Superintendent; or if no such beneficiary be then living, to my next of kin (as determined by the laws of the State of Maryland) in accordance with Regulation No. 18; subject to all the provisions and requirements of said regulations.

** I expressly stipulate that my marriage shall ipso facto have the effect to substitute my wife in the place and stead of the beneficiary named above to receive said benefits, in the event of my death, if she be then living.*

I further agree that this application when accepted by the Superintendent shall constitute a contract between myself and the said Company, governed in its construction and effect by the laws of the State of Maryland, and as such be an irrevocable power and authority to said Company to appropriate the above amounts from my wages and apply the same as aforesaid, and shall constitute an appropriation and assignment in advance to the said Company in trust for the purposes of the relief feature, of such portions of my wages, which assignment shall have precedence over any other assignment by me of my wages or of any claim upon them on account of liabilities incurred by me.

I also agree for myself and those claiming through me, to be specially bound by Regulation No. 11, providing for the final and conclusive settlement of all disputes by reference to the Superintendent of the relief department, and an appeal from his decision to the Committee on the relief department; and also by Regulation No. 35, providing for loss of all rights hereunder by failure to contribute as therein provided.

I understand and agree that this application when accepted by the Superintendent, shall constitute a contract between me and the said Company, by which my rights as a member of said relief feature and as an employee of said Company shall be determined as to all matters within its scope; that each of the statements herein contained and each of my answers to the questions asked by the Medical Examiner and hereto annexed shall constitute a warranty by me, the truth whereof shall be a condition of payment of the benefits aforesaid.

I hereby certify that I am _____ years of age, am correct and temperate in my habits, and have no injury or disease, constitutional or other, which will tend to shorten my life; am now in good health and able to earn a livelihood. In witness whereof, I have signed these presents at _____ in the State of _____, this _____ day of _____, 18____.

Witness;

The foregoing application is accepted at the office of the Superintendent of the relief department in Baltimore City, Maryland, this _____ day of _____, 18____.

Superintendent of the Relief Department.

* The Medical Examiner will in the cases of applicants already married, erase this paragraph.

Applications when accepted, will take effect from the date of execution, or from any subsequent date upon which the applicant actually begins work.

18. The beneficiary or beneficiaries named in any application for full membership, if the applicant be married, must be his wife or his wife and children. If he be single, the beneficiaries must be his father and mother or the survivor. No application will be accepted which does not comply with these requirements, unless the Superintendent waive the same for reasons satisfactory to him. No one shall be entitled as the beneficiary of a member who is not the widow or a relation not more remote than a first cousin, except in case of the assignment to the Superintendent of the natural death benefit to secure a loan from the savings feature or in case of the taking of special natural death benefit for that purpose.

19. Membership in the natural death benefit only may be maintained during furlough or suspension by making the contributions required therefor and otherwise complying with these regulations.

20. Furloughed or suspended members who are restored to duty within (6) months, from the date of such furlough or suspension, may be restored to full membership without reference to the requirements governing the admission of new members. If restored to duty after six (6) months, it will be on the same conditions as new employees.

21. Persons who have once become members must continue so while in the service. Whenever a member ceases to be employed in the service, his membership will, *ipso facto*, terminate from that date (except in the cases hereinafter provided for), unless he shall within ten (10) days thereafter sign and deliver to his employing official for transmission to the Superintendent of this department, an application in the second form shown in Regulation No. 17, to retain his natural death benefit only. Every such member shall on re-entering the service be subject to the regulations governing new employees.

A member who at the time his employment ceases is disabled by injury or sickness will continue to receive the benefits therefor during the period provided in these regulations, and during such period will retain the death benefit covered by his application. After the expiration of said period he may retain his natural death benefit only, by making application as above provided within ten days from the date of the last payment of benefits on account of such injury or sickness; otherwise his membership will wholly cease from that date.

CONTRIBUTIONS.

22. The word "contributions" wherever used in these regulations refers to the sums paid into the treasury of the Company on account of the relief feature either by appropriation of wages earned or by deposits of cash, for or by members.

23. Members will be divided into two general classes, viz :

1st Class. Those engaged in operating trains or rolling stock.

2nd Class. Those not so engaged.

These will be further divided according to their average monthly pay, as follows :

A. Those receiving not more than thirty-five dollars (\$35.00).

B. Those receiving more than thirty-five (35) and not more than fifty dollars (\$50.00).

C. Those receiving more than fifty (50) and not more than seventy-five dollars (\$75.00).

D. Those receiving more than seventy-five (75) and not more than one hundred dollars (\$100.00).

E. Those receiving more than one hundred dollars (\$100.00).

24. The contributions for these classes shall be made each calendar month in advance at the following rates :

	A	B	C	D	E
First Class					
Per month.....	\$1.00	\$2.00	\$3.00	\$4.00	\$5.00
Second Class					
Per month.....	.75	1.50	2.25	3.00	3.75

25. The contribution for the natural death benefit only shall be at the rate of twenty-five (25) cents per month for each such benefit of the lowest class.

26. The class to which a member is to be assigned will be ascertained by multiplying his average daily wages by twenty-six (26), the average number of working days in a month.

Cases of doubtful classification, either as to hazard of occupation or contributions to be made, will be decided by the Superintendent of the relief department.

When a member's pay is increased beyond the limit of the class in which he contributes, he will enter the correspondingly higher class. He may enter a correspondingly lower class if his pay is reduced. In either case he must make a new application, without

medical examination, to correspond with the change. Change of occupation, involving change from first to second class, or *vice versa*, will require new application and change of rate of contribution.

27. The amount to be contributed or returned for a part of a month will be ascertained on the basis of thirty (30) days per month, adding to make even cents where fractions occur.

28. Contributions will be due on the first day of each calendar month and will ordinarily be made by the appropriation of wages earned in the preceding month. The first contribution will be for the unexpired part of the month in which the application takes effect and for the whole of the next month.

29. The contribution of a member who enters and leaves the service in the same month, will be only for the period between the date his application takes effect and that on which he leaves the service, both inclusive.

30. A member who earns no wages in any month from any reason other than injury or sickness entitling to benefits, must contribute from the first wages earned in the month in which he resumes work for the unexpired portion of that month and for the whole of the next month. If a member fail to earn wages by reason of injury or sickness entitling to benefits, he will be entitled to the benefits covered by his application for the month in which he resumes work, without contribution for that month.

31. No portion of the contribution of a member for the month in which he dies will be returned, but contributions for subsequent months will be.

32. No contribution need be made by a disabled member for the time for which he receives benefits, subsequent to the next month after that in which the disability begins.

33. No appropriation is to be made from the final payment of wages to a member leaving the service, except for contributions in arrears. If he leaves the service before the expiration of the time for which he has contributed, the unearned portion of such contribution will be returned to him.

34. Contributions other than those made by appropriation of wages must be made by deposits with the Treasurer or some bonded agent of the Company, notice of such deposit being forwarded to the Superintendent by the member.

35. If a member who is furloughed or suspended or has left the service, but who retains the natural death benefit, fails to make his monthly contribution by deposit as aforesaid and forward the

notice to the Superintendent, on or before the last day of the calendar month next following that for which his last previous contribution was made, he shall *ipso facto* and without further notice or other action by the department lose all rights of membership therein and cease to have any claim to receive benefits therefrom.

NOTICE OF DISABLEMENT.

36. A member disabled by injury or sickness must immediately notify the official designated by the General Manager to receive reports of disablement. A member must always give his proper address when reporting himself disabled, and report any change therein. His disablement will be taken to begin with the date of such report; and a member failing to make such report during his disablement will receive no benefits.

37. Officials designated as aforesaid to receive reports of disablement will immediately notify the Superintendent of the relief department and the Medical Examiner in whose district the member is to be found. Any official who, through negligence or other cause within his control, delays or fails to send such notices, will be required to make good to the member any loss he or she may thereby sustain. Notice of death must be forwarded promptly by the official under whom the deceased was employed. In case of death from injury, all the particulars, so far as known, must be given.

38. The employing official must promptly report the return of the member to duty, to the Medical Examiner having charge of the case.

BENEFITS.

39. Wherever used in these regulations the word "benefits" will be understood to mean the sums of money which may become payable under these regulations; the phrase "accidental injuries" to mean only bodily injuries directly produced by external violence, excluding sunstroke and frostbite; "accident benefit" to mean the right of a member to receive benefits under these regulations in case he is disabled by "accidental injuries"; "sick benefit" to mean the right of a member to receive benefits, under these regulations, in case he is disabled by sickness or causes other than accidental injuries covered by the accident benefit; "accidental death benefit" to mean the right of a member, under these regulations, to designate certain beneficiaries to whom benefits shall be

paid in case of his death from accidental injuries ; "natural death benefit" to mean the right of a member, under these regulations, to designate certain beneficiaries to whom benefits shall be paid in case of his death from causes not covered by the accidental death benefit ; "natural causes" to mean causes other than accidental injuries received in the discharge of duty in the service.

40. The fund from which these benefits are to be paid will be formed by the contributions of members and the Company, the income or profits derived from investment of the funds of the relief feature, and such gifts, legacies, etc., as may be made to the Company for the use and benefit of the relief feature.

41. Members will be entitled to benefits upon the conditions prescribed in these regulations, as follows :

First. Payments while totally disabled by accidental injury received in the discharge of duty in the service, for each day other than Sundays and legal holidays, during a period not exceeding twenty-six (26) weeks, at the rate of fifty (50) cents per day for a member of the lowest class, and at higher rates for members of the other classes in proportion to their contributions ; and at half these rates during the continuance of the disability after the first twenty-six (26) weeks.

Second. Payments while totally disabled by sickness, or from any cause other than accidental injuries received in the discharge of duty in the service, for each day other than Sundays and legal holidays, after the first six working days of such disability, and for a period not exceeding fifty-two (52) weeks, at the rate of fifty (50) cents per day for a member of the lowest class, and at higher rates for members of the other classes in proportion to their contributions.

Third. Payment, on the death of a member of the lowest class from accidental injuries received in the discharge of his duty in the service, of five hundred dollars (\$500), and of greater amounts for the other classes in proportion to their contributions.

Fourth. Payment, on the death of a member of the lowest class from any cause other than accidental injuries received in the discharge of duty in the service of two hundred and fifty dollars (\$250), and of greater amounts for the other classes in proportion to their contributions.

Fifth. Payment of fees for such surgical attendance as the Medical Examiner shall approve as necessary in consequence of accidental injuries received in the discharge of duty in the service, at the rates fixed in the schedule adopted by the department, when

the bills therefor are approved by the local Medical Examiner. The Superintendent will arrange for the admission of members to hospitals, at moderate cost, when requested.

42. The following table shows in brief the contributions and the benefits of the several classes :

	A	B	C	D	E
Rates of contribution per month—					
First Class.....	\$1.00	\$2.00	\$3.00	\$4.00	\$5.00
Second Class.....	.75	1.50	2.25	3.00	3.75
Entitling to benefits—					
For accidental injuries per day, not including Sundays and legal holidays,					
First 26 weeks.....	.50	1.00	1.50	2.00	2.50
After 26 weeks.....	.25	.50	.75	1.00	1.25
For sickness per day, not including first six working days, Sundays or legal holidays, for 52 weeks.....	.50	1.00	1.50	2.00	2.50
In the event of death from—					
Accidental injuries....	\$500	\$1,000	\$1,500	\$2,000	\$2,500
Natural causes.....	250	500	750	1,000	1,250

43. Any member under fifty (50) years of age who can pass a satisfactory medical examination may enter a higher class than that to which his pay assigns him, or may take additional natural death benefits, provided his total natural death benefit shall not exceed thirty times the natural death benefit of a member of the lowest class.

44. If a member recover from the effects of accidental injury received in the discharge of duty so that in the opinion of the medical examiner he is no longer disabled thereby, but continue disabled from sickness or debility, he will be entitled to benefits not longer than 52 weeks from the date of such injury, and at the rate payable for sickness.

45. If a member returns to duty after receiving benefits for sickness for less than twelve weeks, and is again disabled by sickness within two weeks thereafter, the two disablements may, at the option of the Superintendent, be treated as one in computing the fifty-two weeks for which benefits may be paid ; and, if so treated, the deduction of six working days will be made only from the first

disablement. A member who returns to duty after being disabled by sickness for twelve weeks or longer, will be entitled to receive benefits for sickness only after he has been continuously engaged in the performance of duty for four weeks.

46. No benefits will be paid on account of injury, sickness or death, occurring at any place outside of the United States, or where epidemic diseases of a dangerous character are likely to prevail, and to which his duties as an employe of the Company do not call him, and contributions will be returned which cover any time subsequent to the date at which a member, though on furlough, may go to such places. Exceptions to this rule can be made only by the Superintendent upon a full statement of the facts.

47. Benefits will not be paid for injury or sickness which is in any way caused or increased, in whole or in part, by intoxication, the use of intoxicating liquors, sexual immorality, breach of the peace, or other violation of law on the part of the member; or for death by the hands of justice.

48. A member will not be entitled to any benefits for time for which he receives wages from the Company.

49. No claim for benefits under any of these regulations shall be payable or paid, until there be first filed with the Superintendent satisfactory proof, in such form as he may require, of the validity of such claim. Benefits will be paid only for the period of actual disability as certified by the Medical Examiner.

50. The Superintendent will provide for the visitation of members reported disabled by injury or sickness, and those who decline to submit to such visits or examinations, or who absent themselves from their usual places of residence, or are in places so distant that the Medical Examiner cannot be expected to visit them, will not be entitled to benefits.

51. Benefits on account of accidental injury will be paid only when shown by evidence satisfactory to the Superintendent to have been received by the member while actually engaged in the performance of duty in the service to which he was assigned, or in voluntarily protecting the Company's property. In all cases there must be external or other positive evidence of injury, and the person claiming benefits must produce proof satisfactory to the Superintendent that the disablement is the direct result of accidental injury received as aforesaid, and renders the member totally unable to labor, or, when of a permanent character, to earn a livelihood in any employment. In case of death, it must be shown to have occurred solely by reason of, and within twenty-six (26) weeks

after an accidental injury received as aforesaid, and the benefits payable, in the event of such death, shall in no case exceed the amount payable under the accident death benefit of the class to which the member belonged by virtue of his accepted application at the time of his death. Death after the twenty-six (26) weeks above limited will be treated as death from natural causes. The results of injuries received otherwise than in the performance of duty as aforesaid, will be treated as sickness or death from natural causes.

52. In the event of disability or death from accidental injuries, the benefits herein promised shall not be payable or paid until there be first filed with the Superintendent of the relief department releases satisfactory to him, releasing the Company, and all other companies operating its branches or divisions, or whose employees are admitted to the privileges of this department, from all claims for damages by reason of such injury or death, signed by all persons who might bring suit for such damages, or those legally competent to release for them, and by the beneficiaries named in the respective applications.

53. Should suit be brought by a member, his beneficiary or his legal representative, or for the use of his beneficiary alone, or with others, against the Company or any company operating its branches or divisions, or whose employees are admitted to the privileges of this department, for damages on account of injury or death of such member, no benefits on account of such injury or death shall be paid, but all claims to such benefits under these regulations shall be forfeited, unless such suit be discontinued and all costs incurred by the defendant therein paid by the plaintiff before any hearing or trial on demurrer or otherwise. Should such a suit for damages on account of the death of a member be brought by any person claiming an interest other than those named above, the existence of such suit shall prevent the payment of benefits on account of such death, and any payment by any of the Companies above mentioned of damages recovered in such suit, or determined by compromise, or of any costs incurred therein, shall operate as a release in full of all claims against this department.

54. No claim for benefits of any kind under these regulations shall be made, or if made, be accepted and paid, unless it be presented with the proofs required by these regulations within one year from the date of the death, injury or sickness on which the claim is based. Benefits unclaimed, or the right to which is in dispute, will not bear interest. Benefits allowed, but remaining

unclaimed for three years from the date of the allowance thereof, will lapse, and will not be payable thereafter.

55. A new member whose application has been accepted will be entitled to all the benefits covered thereby from the date he actually begins work. If an employe receives accidental injuries in the discharge of his duty in the service after making application for full membership and passing an examination satisfactory to the Medical Examiner, but before his application is accepted by the Superintendent, he will be entitled to the accident benefit and the accidental death benefit, his contribution being made from wages earned or benefits payable.

56. A member who is absent from duty beyond the month for which the last regular contribution from his wages was made, or who has earned no wages within that month, will be entitled to no benefits after that month, except in the cases specially provided for in these regulations.

57. All rights to receive benefits shall cease from the date a member ceases to be employed in the service, except in the cases provided for in Regulation No. 21.

58. The benefits on account of the death of a member will be paid to the beneficiary designated in the application. If none such be living, the benefits shall lapse and remain for the benefit of all the other members. The Superintendent may, in such a case, defray the expenses of the member's funeral so far as he deems proper.

59. The benefits on account of injury or sickness will be paid only to the member entitled thereto. If the member becomes insane or otherwise incapacitated to act, the benefits may, in the absence of a legally appointed guardian, be applied to meet the wants of the member or his family directly, or by payment to his wife or near relative. All benefits unpaid at the time of a member's death will be paid to the person entitled to receive the death benefit.

60. No assignment of benefits or change of beneficiary will be permitted without the written consent of the Superintendent, nor shall benefits be subject to attachment or other legal process. If any attachment or other legal process is served upon the Superintendent or the Company, all benefits due or to become due to such member shall lapse and remain in the funds of the department, subject to the order of the Committee.

61. Benefits and all other claims against the relief department will be paid monthly by checks signed by the Superintendent.

For claims originating on the main stem and branches, includ-

ing the Philadelphia Division, received at the Superintendent's office in proper form for settlement on or before the 10th day of each month, checks will be issued on the 20th of that month, or on the 21st if the 20th be Sunday or a legal holiday. For claims originating on the Trans-Ohio or Pittsburg Divisions, received at the Superintendent's office in proper form for settlement on or before the 1st day of each month, checks will be issued on the 10th of that month, or on the 11th if the 10th be Sunday or a legal holiday.

62. Checks issued by the Superintendent of the relief department will be cashed by the Treasurer or any bonded Agent or Cashier of the Company having Company's funds in his possession, and such checks may be used as cash or vouchers in settlement with the accounting department. For contributions refunded receipts must be taken on the prescribed form and sent to the Superintendent of the relief department, who will issue checks in favor of the official paying them.

Each member will be notified in whose care his check is sent. Officials receiving checks will be held responsible for their prompt and safe delivery to their owners. No duplicate check will be issued within sixty (60) days from the date of the original, and no original check presented for payment after sixty (60) days from its date must be paid until it has been certified on its face by the Superintendent of the relief department that no duplicate has been issued.

63. Death claims will be paid within sixty (60) days after satisfactory proof of death is furnished. In urgent cases the Superintendent is authorized to advance a portion of the death benefit.

MISCELLANEOUS.

64. Members of the relief feature in the service of the Company, their wives and children, fathers, mothers, brothers or sisters wholly dependent upon them for support, will be entitled to travel over all the lines of the Baltimore and Ohio Railroad Company at one-half the rates charged the public for the transportation only. The children of such members, under sixteen years of age, shall travel free over all lines when going to or returning from daily school. Furloughed or suspended members, and pensioners, who retain their natural death benefit, will be entitled to the same privileges.

65. In reductions of force, temporary or permanent, preference as to retention in the service will be given to members of the relief feature and depositors or borrowers of the savings feature,

other things being equal, over those in the same grades of service not connected with the relief department.

66. When a member ceases to be employed in the service, the cause must be noted on the pay roll on which the last payment to him is made. When a member fails to earn wages in any calendar month, by reason of sickness or injury, his name will be carried on that and future pay rolls, and the cause for not earning wages noted opposite his name. The numbers of the certificates of membership must also be entered opposite members' names on the pay rolls.

67. All members injured in the service of the Company, and in the discharge of their duty, to such a degree as to incapacitate them from earning a livelihood at their usual occupations, should be provided, so far as possible, with such positions in the service as they can efficiently fill.

68. As to all members of the Baltimore and Ohio Employees Relief Association on the 31st day of March, 1889, all of these regulations shall be so interpreted and applied that each such member may acquire membership in the relief feature of this department in the class, and with the same number of additional natural death benefits, to which he would have belonged, if his application or applications made in the relief feature of said association, and then in force had been made and accepted under these regulations; provided that he execute within the time fixed by the order of the President a proper application in one of the forms prescribed in these regulations, but containing an additional clause by which such member shall assign and make over to the Company all his right, title and interest in or to the assets of the relief and pension features of said association, and shall assent to the transfer of said assets by said association, to the Company for the purposes of the like features of this department respectively.

SAVINGS FEATURE.

DEPOSITORS.

69. Any employe of the Company, his wife, child, father or mother or the beneficiary of any deceased member of the relief feature may deposit with any depository designated by the Company, any sum not less than one dollar, nor more than one hundred dollars in any one day unless otherwise specially authorized by the Superintendent.

70. Parents or others may deposit in the name of any child, such deposit being subject to the order of the parent or other adult ;

and a minor may deposit in his own name, subject, however, to the order of an adult.

71. Any person entitled under these regulations who wishes to become a depositor, shall execute an application, in which there shall be set forth the applicant's full name, residence and occupation, and the name and residence of the person to whom, in the event of death, his or her deposits and the profits accrued thereon shall be paid ; when executed he shall forward it to the Superintendent.

72. If the application be accepted a pass-book will be issued, in which shall be recorded each deposit and withdrawal as soon as made ; the entry to state the amount in writing, and in figures, to be dated and signed by the depositor or depositary as the case may be. This pass-book must be brought to the depositary each time a deposit is made, or money withdrawn, that the transaction may be regularly noted.

73. The depositaries designated by the Company to receive deposits will be supplied with duplex tickets, upon which every deposit must be reported. The depositor must personally send to the Superintendent at Baltimore the duplicate ticket in a sealed envelope. The original will be sent to the same address by the depositary. Until each deposit is entered on the pass-book by the depositary, and the duplicate ticket forwarded to the Superintendent by the depositor, the transaction is not complete.

74. No persons other than those specifically designated by the Company are authorized to receive deposits, nor will this department become responsible for any moneys not deposited in strict conformity with these regulations. The Company guarantees the repayment of all deposits so made, and the payment of interest thereon under the terms and conditions herein set forth.

75. On all sums of five dollars and upwards that have been on deposit not less than three calendar months interest will be paid at the rate of four per cent. per annum (until changed by notice) from the first day of the month succeeding that in which the deposit was made. No interest will be paid on fractional parts of a dollar or for parts of a calendar month. Three months' notice will be given of any change in this rate of interest.

In addition to the interest guaranteed depositors, the Committee may, in their discretion, after the close of any fiscal year, award them dividends from the net earnings of the savings feature, in proportion to the interest credited to their respective accounts for that year.

76. Interest on deposits will be credited at the end of each fiscal year and will thereafter form part of the principal.

77. No interest will be allowed on any account after the expiration of ten years from the date of the last credit entry of the account exclusive of entries of interest.

78. A depositor wishing to withdraw money from the savings feature must forward to the Superintendent an order for the amount on the blank provided for the purpose and obtainable from the Superintendent or any designated depository. Upon receipt of such order, a check for the amount in favor of the payee named in the order will be forwarded to the depositor in the care of the depository designated in the order, who will deliver the same after entering the amount in the depositor's pass-book.

79. Checks not delivered in fifteen days will be returned by depositories to the office of the Superintendent, and by him cancelled.

80. The Committee may require thirty days' notice of each order for the withdrawal of a sum exceeding one-fourth the entire deposit on which the order is drawn; though under ordinary circumstances this requirement will not be enforced.

81. No money will be paid or check delivered except to the depositor or to his or her order attested by a disinterested witness; and except upon identification of the person, presentation of the pass-book and entry of the transaction therein.

82. Presentation of a depositor's pass-book, together with an order from him in the form prescribed, at the office of the Superintendent, shall be conclusive evidence that the person presenting the same is the payee named in the order, and shall make the delivery of the check and the payment of the money thereon to such person a valid delivery and payment as against the depositor, without liability therefor on the part of the Company or any of its agents.

83. A depositor who has ceased to be employed by the Company may retain his privileges as a depositor, if he then have a balance to his credit of not less than fifty dollars; otherwise, his account must be finally closed within thirty days, and balance, if any, withdrawn.

84. In case a depositor loses his pass-book, immediate notice of the loss must be given the Superintendent, and after a reasonable time has elapsed in which to notify all concerned, a duplicate will be furnished so marked, upon the payment of fifty cents.

85. The pass-books held by depositors must, whenever required, be forwarded to the Superintendent by train mail. Regularly on the 30th day of September (or if that date falls on Sunday, then on

the day preceding), each depositor must forward his or her pass-book to the office of the Superintendent (through the nearest depository, who will receipt for it), in order that interest accruing on deposits may be properly entered therein.

BORROWERS.

86. Any adult employe of the Company who is a member of the relief feature and has been continuously in the service not less than one year, may borrow from the Savings Feature sums not less than one hundred (\$100) dollars, at the interest rate of six per cent. per annum, charged from the first day of the month in which the loan is consummated, upon the terms and under the conditions herein provided.

87. Any such employe wishing to secure a loan shall make an application in the form prescribed. The application should state particularly the amount of the loan, the purpose for which it is desired and the property offered as security therefor and that the applicant agrees to be bound by these regulations.

88. The Superintendent will on receipt of the application, obtain from the Building Inspector or other competent person a report on the value of the property offered as security, and from the proper official a report of the applicant's service record, and such other information as may be necessary to show that the applicant's case fulfills all the requirements of these regulations. If the case fulfills all the requirements, the Superintendent will submit the application and all the information obtained by him to the Committee or sub-Committee thereof, who will in their discretion grant or refuse the loan, and whose decision shall be final.

89. Before any loan will be submitted to the Committee, it must appear to the satisfaction of the Superintendent that the money will be used to acquire or improve a homestead, situated within the limits hereinafter defined, or to free it from debt, and it must further appear from the reports obtained by the Superintendent, that the amount of the loan does not exceed three-fourths of the market value of the property offered as security, and that the service record of the applicant is good.

Preference will be given to those applicants who have the best service record, and to those who will use the loan to acquire or improve a homestead. The homestead must be adjacent to the Baltimore and Ohio Railroad, or one of its branches or divisions within one mile thereof, unless located in a city through or into which such Railroad runs.

90. The Superintendent will promptly notify the applicant of the Committee's decision. If the loan be granted it will be subject to the approval of the title by the general counsel of the Company, and the applicant must within 60 days forward to the Superintendent an abstract of the title to the property. Upon the approval of the title and the execution, delivery and recording of such conveyances and other instruments as the counsel may deem necessary to secure the Department, the loan will be consummated and the money will be applied directly by the Superintendent for the purposes for which the loan was granted under the conditions herein provided.

The expenses of obtaining the abstract of title, drafting necessary papers, recording deeds, &c., including a fixed charge of \$5 for legal expenses in the Department, must be borne by the borrower. All title papers will be filed with the Department, until the loan is repaid.

Loans not consummated within 90 days from the date of the meeting at which granted, can be consummated only if again approved by the Committee.

91. No money will be paid directly to the borrower, but the Superintendent will with the approval of the borrower pay the purchase money of or discharge the liens or debts on the property. In case the loan be granted for the purpose of building on or otherwise improving real estate, the Superintendent will apply the money to the payment of bills for labor or material, approved by the borrower and certified by the Building Inspector of the Department; but no such bill will be paid before the completion of the building or improvement, and then only when it is clearly shown that the amount applicable is sufficient to discharge all lienable claims, and free the property from all liens, debts or incumbrances of any kind, and only when the said Building Inspector has certified that the value of the improved property exceeds by one-fourth the amount of the loan. Where the loan is found insufficient to meet these conditions it will not be increased, but will be cancelled, having been granted only on these conditions precedent.

92. Every borrower must provide life insurance in the natural death benefit of the relief feature, to an amount equal at all times to his indebtedness to the savings feature in such manner that the benefits payable in case of his death may be available to discharge the said indebtedness. If the borrower cannot under the regulations of the relief feature obtain insurance therein to the amount of his indebtedness, he must provide in the same manner insur-

ance on his life in some regular life insurance company satisfactory to the Superintendent.

93. The borrower must also keep the improvements on the property taken as security fully insured against fire, in a company approved by the Superintendent or designated by the Committee, and have the policy or policies therefor assigned in such a manner as the Superintendent may direct so as to protect the interests of the savings feature.

94. The borrower must promptly pay all taxes, assessments, public dues and charges levied upon the property taken as security and present proper receipts therefor for the inspection of the Superintendent whenever requested. If he fail to do so the Superintendent may if he think such failure likely to impair the security, pay the same and deduct the sum so paid with legal interest from the borrower's monthly payments hereinafter required before crediting the latter upon the principal or interest of the loan.

95. The amount charged to the borrower's account for money loaned, and for expenses, premiums on life or fire insurance, taxes, or other charges paid on his account must be repaid with interest by payments into the savings feature on the first day of each calendar month, beginning with that following the one in which the loan is consummated, at the rate of not less than one dollar and fifty cents (\$1.50) for every hundred dollars borrowed until the principal and interest be paid in full. The monthly payments will in the option of the Superintendent be applied to the payment of all the other charges in the account, before crediting any part upon the principal of the loan.

96. To secure the monthly payment of the sums above required, the borrower shall execute an order on the Company authorizing it to apply monthly from the first wages earned by him in each calendar month the amount of said monthly payment to the credit of his account with the savings feature, which order shall be irrevocable during the existence of his indebtedness and shall constitute an appropriation and assignment in advance to the Company in trust for the purpose aforesaid, of such portion of his wages having precedence over any other assignment by him of his wages or of any claim upon them on account of liabilities incurred by him, subject, however, to the assignment contained in his application for membership, in the relief feature.

97. A borrower who earns no wages in any month or who has left the service, must at his own risk make his monthly payments to the Treasurer of the Company and should at the same time notify the Superintendent.

He must also keep the Superintendent advised of his address.

98. If the borrower fails to make the monthly payments required by these regulations, so that three such payments are in arrear and unpaid, or if he make default in the payment of any premium for fire or life insurance or any tax, assessment or charge required to be paid by him under these regulations for a period of thirty days after the same becomes due and payable, the whole amount of the principal sum and interest of his indebtedness shall become and be due and collectible at the option of the Committee, and the Superintendent shall, if so directed by the Committee, take all steps necessary to sell and realize on the property held as security for said indebtedness.

99. Deductions from wages for the monthly payments of borrowers must be entered on the pay rolls opposite the names of the borrowers respectively in a separate column and designated at the foot of the roll as deductions to the credit of the savings feature.

The fact that a borrower has left the service must be noted on the pay roll on which the last payment to him is made.

PENSION FEATURE.

100. The fund for the payment of pensions will be derived wholly from the contributions of the Company. The Company's contributions will be applied to the purposes which are herein stated in the order of their precedence.

First. To provide means of support during life for those persons members of the relief feature or of the Baltimore and Ohio Employes' Relief Association for four consecutive years, who, having served the Company for ten consecutive years, and having reached the age of sixty-five shall be honorably relieved from duty.

Second. To provide in the same manner for like persons who elect to retire from the service.

Third. If at any time the fund applicable, to the purposes of this feature shall, in the opinion of the Committee, be more than sufficient to provide for the persons mentioned above, such surplus shall be applied to aid or support such class or classes of the Company's employes, members of the Relief feature, as the Committee may think most deserving and most in need of help, under such supplemental regulations as the Committee may then adopt.

101. No member shall be entitled to wages from the Company and to a pension allowance at the same time, or to benefits from the relief feature and a pension at the same time.

102. Pensions will be paid monthly. Each pensioner will receive a daily allowance, excluding Sunday, equal to one-half the benefits provided to be paid for sickness under the regulations of the relief feature to a member of the class to which the pensioner would while in the service have been assigned under said regulations, had he been required to become a full member in said feature. In the case of a pensioner who has been continuously a member of the relief feature of the Baltimore and Ohio Employees Relief Association fifteen years, this allowance will be increased by the addition of five per cent. thereof; and a like addition will be made for each additional term of five consecutive years of such membership.

The following table shows in brief the amount of allowances to pensioners:

	10 years membership, and under $\frac{1}{2}$ sick rate.	15 years membership, 5 per cent. additional.	20 years membership, 10 per cent. additional.
Those contributing under Relief Feature to Class A.....	\$.25	\$.26 $\frac{1}{4}$	\$.27 $\frac{1}{4}$
Those contributing under Relief Feature to class B.....	.50	.52 $\frac{1}{4}$	.55
Those contributing under Relief Feature to class C.....	.75	.78 $\frac{1}{4}$	.82 $\frac{1}{4}$
Those contributing under Relief Feature to class D.....	1.00	1.05	1.10
Those contributing under Relief Feature to class E.....	1.25	1.31 $\frac{1}{4}$	1.37 $\frac{1}{4}$

103. The Committee may at any time make a percentage reduction of all pensions, or further limit the classes of persons who may become pensioners.

104. The statement of a member's age contained in his application for membership in the relief feature, shall, for the purposes of this feature, be final and conclusive.

105. For the purposes of this feature members shall be considered as in the Company's service during the time they receive benefits from the relief feature.

106. The failure of any pensioner to claim his benefits for two years, counted from the last payment to him, shall be presumptive evidence that such pension has terminated, by reason of the pensioner's death, and his name shall be stricken from the list of pensioners, subject to the right of restoration to the same on a new application by the pensioner, and satisfactorily accounting to the Superintendent for his failure to claim his pension.

107. Upon the death of a pensioner the accrued pension to the date of his death shall not be considered a part of the estate of the deceased nor liable to be applied to the payment of the debts of said estate in any case whatever, but shall inure to the sole and exclusive benefit of his widow or children; and if no widow or child survive, no payment whatever of the accrued pension shall be made or allowed, except so much thereof as may be necessary to defray the expenses of the burial of the decedent, in case he shall not leave sufficient assets to meet such expenses, and the burial expenses thus to be allowed shall be in the discretion of the Superintendent.

108. Any pledge, mortgage, sale, assignment or transfer of any right or claim to any pension granted under these regulations shall be void and of no effect, and no one save the pensioner himself, or, in the event of his death, his widow or children, shall be entitled to receive such pension; but the payment to persons laboring under legal disabilities may be made to such persons as the Committee may think proper.

109. No sum of money due, or to become due, to any pensioner under this feature shall be liable to attachment, levy or seizure, by or under any legal or equitable process whatever, whether the same remains with the relief department or any agent thereof, or is in the course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner. Should any creditor of the pensioner endeavor to collect the pension by process of attachment or by any other legal or equitable process laid in the hands or served upon the Company or the relief department for the purpose of paying the debt due by the pensioner to such creditor or any part thereof, all the money due or yet to become due by the department to such pensioner, shall be forfeited to the department, and shall belong to it absolutely, to be dealt with as the Committee shall deem proper.

110. These regulations shall in no way affect any pension heretofore granted to any person admitted to the pension feature of the Baltimore and Ohio Employees Relief Association.

STATISTICS.

Benefits paid by Baltimore & Ohio Employees' Relief Association
from May 1st, 1880, to September 30th, 1887.

	May 1, 1880, to September 30, 1886.		October 1, 1886, to September 30, 1887.		Total Since starting Association.		Average per Payment
	No. of Payments	Costing.	No. of Payments	Costing.	No. of Payments	Costing.	
Deaths from acci- dents.....	307	\$ 318,085.00	73	\$ 80,000.00	380	\$ 398,085.00	\$1,047.43
Deaths from other causes than ac- cidents.....	661	808,610.52	130	57,496.48	791	860,106.97	346.34
Disabilities f'm injuries receiv- ed in discharge of duty.....	14840	193,580.27	3074	53,581.15	18814	247,041.42	13.13
Surgical expenses involved in the above.....	9497	63,989.15	2290	13,834.75	11786	77,823.90	6.62
Disabilities f'm sickness and in- juries not receiv- ed in discharge of duty.....	20342	430,079.00	6517	97,529.90	35859	527,608.90	14.70
Aggregate....	54607	\$1,808,223.94	12053	\$308,442.25	67560	\$1,510,666.19	\$22.35

The year ending Sept. 30, 1887, showed an active membership of 22,155, an increase over the year 1886, of 1858. Since the inauguration of the Association (May 1st, 1880), 70,029 persons have been admitted to membership, of which number 10,922 made application during the fiscal year ending Sept. 30, 1887.

The examination to determine the physical condition of persons applying for membership has resulted in the rejection of 1,460 out of a total of 18,353, and of 149 of those who were examined for sight, hearing and color sense.

REPORT OF ACTUARY.

On the condition of the Baltimore & Ohio Employees Relief Association on September 30th, 1887.

	1887.	1880-1887.
Cash balance on hand at the end of last year was.....		\$184,157.09
Receipts from employes of the B. & O. R. Co. during the past year, and dur- ing the seven years existence of Asso- ciation, have been.....	358,533.59	1,854,661.46

Receipts from interest on investments and from monthly cash deposits with the Treasurer of the Railroad Co., and from interest on the \$100,000 endowment by the B. & O. Co., have been..	8,816.84	66,606.65
Making a cash total of.....	\$551,507.52	\$1,921,268.11
Disbursements during the same period for sickness, accident and natural death; and for dividends paid by increasing the natural death losses; for surgical and medical expenses, and for preparing and publishing monthly and annual reports, have been.....	346,776.27	1,716,536.86
Leaving a cash balance of.....	\$204,731.25	\$204,731.25
To this balance of cash must be added for interest due by B. & O. R. R. Co. on deposits of cash.....		654.70
And dues of the Savings Bank for extra insurance of borrowers.....		521.00
Making total resources.....		\$205,906.95
From this liabilities must be deducted to obtain surplus.		
These are—		
For disablements occurring in 1882....	\$ 2,439.50	
“ “ “ “ 1884....	533.00	
“ “ “ “ 1885....	528.50	
“ “ “ “ 1886....	1,547.00	
“ “ “ “ 1887....	93,276.72	
And reserve on life risks.....	36,437.47	
Making a total of liabilities....		134,762.19
And showing a net surplus of resources over liabilities..		\$71,144.76

C. F. McCAY, *Actuary.*

§ 8. Pennsylvania Company's Voluntary Relief Department.—

An association in joint administration of the relief departments of the following corporations: The Pennsylvania Railroad Company, The Northern Central Railway Company, The West Jersey Railroad Company, The Philadelphia, Wilmington & Baltimore Railroad Company, The Camden & Atlantic Railroad Company, and The Baltimore & Potomac Railroad Company.

REGULATIONS.

GENERAL.

1. The “Relief Department” is a department of the Company's

service in the executive charge of a Superintendent, whose directions in carrying out its regulations are to be complied with, subject to the control of the General Manager.

2. In these regulations, unless otherwise indicated, the titles "Company," "Board of Directors," and "General Manager," will be understood as meaning the Pennsylvania Railroad Company and the Board of Directors and General Manager of that Company.

3. The object of this department is the establishment and management of a fund to be known as "The Relief Fund," for the payment of definite amounts to employes contributing to the fund, who under the regulations shall be entitled thereto, when they are disabled by accident or sickness, and in the event of their death, to the relatives or other beneficiaries specified in the applications of such employes.

4. The relief fund, from which the proposed benefits are to be paid, will be formed by voluntary contributions from employes ; appropriations, when necessary to make up any deficit, by the Company ; and income or profit derived from investments of the moneys of the fund and such gifts or legacies as may be made to the Company for the use of the fund.

5. The Company will take general charge of the department ; guarantee the fulfillment of the obligations assumed by it in conformity with the regulations from time to time established ; take charge of the funds, and be responsible for their safe-keeping ; supply the necessary facilities for conducting the business of the department, and pay all the operating expenses thereof.

6. There shall be an Advisory Committee constituted, as follows :

The General Manager shall be *ex officio* a member and Chairman of the Committee.

The other members of the Committee shall be chosen annually, in the month of November, to serve for one year from the first day of January next succeeding, and until their successors are chosen, as follows :—

By the contributing employes of the Pennsylvania Railroad Division, from among themselves, one member ;

By the contributing employes of the United Railroads of New Jersey Division, from among themselves, one member ;

By the contributing employes of the Philadelphia & Erie Railroad Division, from among themselves, one member ;

And by the Board of Directors of the Pennsylvania Railroad Company, three members.

The members selected by the contributing employes shall be

chosen by ballot, the vote being taken and certified under oath by tellers selected by the Advisory Committee. Each member of the relief fund will be entitled to cast one vote.

For the Committee to serve during the first fiscal year, and to fill vacancies occurring thereafter, the members to represent the employes shall be designated by the General Manager. Such members and the members to be chosen by the Board of Directors, for the original Committee or to fill vacancies, shall serve until their successors are duly chosen as above provided. The Superintendent of the relief department shall be Secretary of the Committee.

Should any other corporation or corporations associated in interest with this Company, adopt or have adopted, regulations establishing relief departments similar to the one hereby established, this Company shall have power to associate itself with such corporation or corporations in the administration of the relief departments hereby and thereby established, when so authorized by the respective boards of directors of this and said corporation or corporations.

Such association shall be evidenced by agreement or agreements duly executed, authorizing, among other things, the constitution of a joint Advisory Committee, to be chosen, as and in the manner therein prescribed, by the several parties thereto, and their employes, either by separate action in behalf of each of said parties, or by the united action of two or more of them as to any member or members of said Committee; the original Committee to be constituted and vacancies occurring thereafter to be filled, in such manner as shall be prescribed.

In the event of any association as aforesaid, the functions and powers herein given to and vested in the Advisory Committee created as hereinbefore provided, shall, during the continuance of said agreement or agreements, be transferred to and vested in the Advisory Committee constituted as prescribed in said agreement or agreements, chosen as therein directed, and so much of the organization and regulations of the relief department herein provided for, as relates to the constitution of an Advisory Committee consisting solely of officers and employes of this Company, shall be suspended, with the understanding, however, that upon the determination of such agreement or agreements, the Advisory Committee herein provided for, constituted as herein prescribed, shall reassume the functions and duties herein committed to it.

7. The Advisory Committee shall have general supervision of

the operations of the department, and see that they are conducted in accordance with the regulations.

The Committee shall hold stated meetings once in three months, at such time and place as they shall determine, and shall meet at other times at the call of the General Manager as Chairman.

It shall be the duty of the Chairman to call special meetings of the Committee upon the written request of three of its members.

8. The Superintendent shall have general charge of all the business pertaining to the department and prescribe the forms and blanks to be used and the reports to be made to the department.

He shall certify to the correctness of all bills, and check-rolls for employes of the department, and send them to the General Manager for approval.

He shall employ, with the approval of the General Manager, a Chief Clerk, Medical Examiners, and such other employes as may be necessary for the proper conduct of the business of the department.

He shall furnish to the Advisory Committee such reports as they may require.

He shall be aided by an Assistant Superintendent, who, in the absence of the Superintendent, shall attend to his duties, and shall at all times perform such duties as may be assigned to him by the Superintendent.

9. Medical Examiners will be employed, who shall, under the direction of the Superintendent of the relief department, be assigned to districts ; prepare applications for membership in the relief fund ; see that members who are sick and injured are properly reported and attended to ; ascertain and report upon their condition ; in conference with attending physicians, decide when members are unfit for duty, and when they are able to return to duty ; prepare claims for benefits payable on account of disability or death ; certify to bills for surgical treatment ; make the required physical examination of applicants for membership in the relief fund, and perform such other duties as may be required of them by the Superintendent of the relief department. The Medical Examiners shall not personally give surgical or medical attendance excepting in emergencies, and shall not accept fees for such attendance.

10. The moneys received for the relief fund shall be held by the Company in trust for the relief department. The Advisory Committee shall direct the investment, and any changes therein, of money which is not required to be kept on hand for current use.

The Company being the Trustee and Guarantor of the fund, the investments shall be in such securities as shall have been approved by the Board of Directors, and shall be in the name of the Company, "in trust for the relief department."

If during the period prior to the first day of January, 1889, or during any one of the successive periods of three years thereafter, the amount contributed by the members of the fund, and received from other sources, should not be sufficient to meet the liabilities incurred for such period, the Company will pay the deficiency, and if at the end of any such period there should be a surplus, after making due allowance for liabilities incurred and not paid, such surplus shall not be used to make up any deficiency in any other such period, but shall be used in the promotion of a fund for the benefit of superannuated members, or in some other manner for the sole benefit of members of the relief fund, as shall be determined by vote of two-thirds of the Advisory Committee, and approved by the Board of Directors.

11. The fiscal year of the relief department shall begin with the first day of January of each year.

12. The condition of the relief fund at the close of each fiscal year shall be audited and reported on by a competent person or persons, selected for that purpose by those members of the Advisory Committee who are chosen to represent the members of the relief fund.

13. Amendments to or changes in the relief department may be proposed by the Advisory Committee, but such shall not be operative unless presented at a stated meeting of the Committee, and considered and adopted at a subsequent stated or special meeting by a majority of the whole Committee, and approved by the Board of Directors; and such amendments or changes adopted and duly announced, shall be binding upon the Company and the members of the relief fund from the dates fixed in the resolutions approving the same.

MEMBERSHIP.

14. Those participating in the benefits of the relief fund must be employes of the Company, and will be known as "members of the relief fund."

15. In referring to the employes of the Company, the expressions "service" and "in the service," will refer to employment upon or in connection with, any of the railroads or works the employes of which shall be admitted to membership in this relief fund,

or in either of those associated in administration therewith, and the service of any employe shall be considered as "continuous" from the date from which he has been continuously employed, without interruption, upon or in connection with, either of such railroads or works, or two or more of them successively.

16. Members will be classified according to the amount of their regular pay per month, as follows :

1st Class. Those receiving not more than forty dollars (\$40).

2d Class. Those receiving more than forty (40) and not more than sixty dollars (\$60).

3d Class. Those receiving more than sixty (60) and not more than eighty dollars (\$80).

4th Class. Those receiving more than eighty (80) and not more than one hundred dollars (100).

5th Class. Those receiving more than one hundred dollars (\$100).

For members not paid by the month, the classes will be determined as nearly as possible by the usual amount of earnings per day multiplied by twenty-six (26).

Any employe becoming a member whose pay is within five dollars of the highest limit of the class determined by his pay may enter the next higher class if he so desires.

For persons in the service of two or more of the Companies associated in the administration of the relief department, the class will be determined by the total pay received from all such Companies, and the membership will be in the fund of the company from which the largest amount is received.

In cases of doubt as to the proper classification, the Superintendent of the relief department shall decide.

17. (As amended.) No employe will be required to become a member of the relief fund.

Any employe not over 45 years of age, who shall have been continuously in the service for a period of one calendar month, may become a member in the class determined by his pay or any lower class, upon passing a satisfactory medical examination.

Any employe who has been continuously in the service for five (5) years immediately preceding February 1st, 1886, and any member of the relief fund who shall have been continuously in the service for five (5) years, including membership in the relief fund for one year, immediately prior to his supplementary application, may, if not over forty-five (45) years of age, enter any class higher than that determined by his pay, upon passing a satisfactory medical examination.

Any member may, on application, change to a class lower than that in which he is contributing, or to a higher class, if not higher than that determined by his pay.

Any member whose pay is advanced may enter any higher class corresponding to his advanced pay without medical examination.

18. (As amended.) Any employe at the time of entering any class as a member of the relief fund, or within two (2) years thereafter may, upon passing a satisfactory medical examination, take additional death benefits of the first class to such extent that the whole amount of additional death benefits for which he shall at any time contribute shall not exceed the amount of the death benefit of the class in which he shall at the time be a member ; provided that medical examination shall not be required of employes in the service prior to February 1st, 1886, upon availing themselves of this privilege within six months after that date.

19. Members of the relief fund may withdraw from the same on giving notice prior to the 25th day of any month on a printed form provided for the purpose, which can be obtained on application, from the persons in charge of the various sub-departments of the Company's service. The obligations and rights in connection with the fund, of members giving such notice, will cease at the close of the month in which the notice is given, and no contribution will be made by any such withdrawing member on the pay-roll for that month.

20. In indicating the relations to the Company's service of employes relieved of employment and pay therein, the following terms shall be used :—

“Resigned” for those voluntarily leaving the service ;

“Relieved” for those permanently relieved without fault on their part ;

“Discharged” for those permanently relieved for cause ;

“Furloughed” for those temporarily relieved without fault on their part ;

“Suspended” for those temporarily relieved as a penalty for offences.

21. A member who is furloughed or suspended for a period extending beyond the date to which his contributions shall have been made, and not longer than nine (9) months, may keep up his title to benefits during such furlough or suspension, by paying his contributions in advance for each month, and in other respects complying with the regulations.

If a member who is absent from duty by reason of furlough or

suspension or other cause than disablement and not receiving wages, shall fail to contribute for a period of three consecutive calendar months, his membership shall cease at the expiration of that time. If contribution by such member is resumed at or before the expiration of three consecutive calendar months, the title to benefits shall recommence upon the date from which contribution is resumed.

APPLICATIONS.

22. Participation in the benefits of the relief fund must be based upon an application by the proposed member, in the form prescribed in Regulation No. 23, approved by the Superintendent of the Relief Department, and upon a certificate of membership issued by him to the applicant.

23. Applications shall be in the following form :—

PENNSYLVANIA RAILROAD COMPANY.

RELIEF DEPARTMENT.

APPLICATION FOR MEMBERSHIP IN THE RELIEF FUND.

To the Superintendent of the Relief Department :

I _____ of _____, in the county
of _____ and State of _____
employed in the service of the Pennsylvania Railroad Company, as
_____ the _____

do hereby by reason of such employment, apply for membership in the Relief Fund and consent and agree to be bound by the regulations of the Relief Department of the said Company as contained in the book of said Regulations, approved by the Board of Directors, which I have read or have had read to me, and by any other regulations of the said Department hereafter-adopted, and by the provisions of any agreement or agreements made by the said Company with any other corporation or corporations associating in administration of their respective Relief Departments, in accordance with said book of Regulations.

I ALSO AGREE, that the said Company, by its proper agents, and in the manner provided in said Regulations, shall apply as a voluntary contribution from any wages earned by me under said employment or from benefits that may hereafter become payable to me, at the rate of _____ per month, for the purpose of securing the benefits provided for in the

Regulations for a member of the Relief Fund of the _____ class, and additional Death Benefit, equal to _____ the Death Benefit of the first class. Death Benefit shall be payable to _____

[Here designate the beneficiary or beneficiaries.]

And I agree that the acceptance of benefits from the said Relief Fund for injury or death shall operate as a release of all claims for damages against said Company, arising from such injury or death, which could be made by or through me, and that I or my legal representatives will execute such further instrument as may be necessary formally to evidence such acquittance.

I ALSO AGREE, that this application, when approved by the Superintendent of the Relief Department, shall make me a member of the Relief Fund, and constitute a contract between myself and the said Company, and that the terms of this application and the Regulations of said Department shall, during my membership, be a part of the conditions of my employment by the Company, and that the same shall not be avoided by any change in the character of my service, or locality where rendered, while in such employment, nor by any change in the amounts applicable from my wages to the Relief Fund, which I may hereafter consent to, and that the agreement that the above-named amounts shall be appropriated from my wages, shall apply also to any other amounts arising from changes made as aforesaid and shall constitute an appropriation and assignment in advance, to the said Company in trust, for the purposes of the Relief Fund, of such portions of my wages, which assignment shall have precedence over any other assignment by me of my wages, or of any claim upon them on account of liabilities incurred by me.

I ALSO AGREE, for myself, and those claiming through me, to be especially bound by Regulation numbered 65, providing for final and conclusive settlement of all disputes, by reference to the Superintendent of the Relief Department and an appeal from his decision to the Advisory Committee.

I CERTIFY, that I am correct and temperate in my habits; that so far as I am aware, I have no injury or disease, constitutional or otherwise, which will tend to shorten my life, and am now in good health and able to earn a livelihood.

I DO HEREBY FURTHER ACKNOWLEDGE, CONSENT AND AGREE, that any untrue or fraudulent statement made by me to the Medical Examiner, or any concealment of facts in this application, or my resignation from the service of the said Company or my being relieved from employment and pay therein at the pleasure of the Company or its proper officers, shall forfeit my membership in the aforesaid Relief Fund and all benefits, rights, or equities arising therefrom, excepting that my leaving the service shall not *(in the absence of any of the other foregoing causes of forfeiture)* deprive me of any benefits to the payment of which I shall have previously become entitled by reason of accident or sickness occurring while in the service.

IN WITNESS WHEREOF, I have signed these presents at _____
in the county of _____ State of _____ this _____ day
of _____ A. D. 18____.

WITNESS: (Signature.) _____

The foregoing application is approved at the office of the Superintend-
ent of the Relief Department at _____ in the county of
_____ State of _____ this _____ day of _____ A. D. 18____

(Signature.) _____

Superintendent of the Relief Department.

For employes, who by the regulations, are not required upon application to pass a medical examination, the above form shall be modified by omitting or erasing the words underlined.

Preliminary notice of request for membership shall be in such form as the Superintendent of the Relief Department shall prescribe.

The following form of supplementary application shall be used for members applying to enter higher or lower classes, or for additional Death Benefit or reduction therein.

PENNSYLVANIA RAILROAD COMPANY.

RELIEF DEPARTMENT.

SUPPLEMENTARY APPLICATION.

To the Superintendent of the Relief Department:

I _____ of _____ in the
county of _____, State of _____, an employe
in the service of the Pennsylvania Railroad Company and a member of
the Relief Fund thereof, by virtue of my former principal application un-
der and subject to the conditions recited in said principal application and
upon the terms thereof, unless, and only so far as, herein modified, do
hereby make this supplementary application for the following, namely:—

[Here specify character of benefits applied for.]

IN WITNESS WHEREOF, I have signed these presents at _____
 in the county of _____ State of _____ this _____ day
 of _____ A. D. 18_____.

WITNESS: (Signature.) _____

The foregoing supplementary application is approved at the office of the
 Superintendent of the Relief Department at _____ in the
 county of _____ State of _____ this _____ day of _____ A. D. 18_____.

(Signature.) _____

Superintendent of the Relief Department.

24. When a member of the relief fund of either of the Companies which may be for the time being associated in the joint administration of their relief departments, shall be permanently transferred to the service of any other of those Companies, notice of such transfer shall be sent by the officer under whom he has been employed, to the Superintendent of the relief department, and thereupon his membership shall be transferred to the relief fund of the Company to whose service he has been transferred, from the date of such transfer.

25. Immediately upon any one entitled to membership signifying a desire to become a member of the relief fund, notice of the same shall be sent from his employing officer in the manner required, to the Superintendent of the relief department, and to the Medical Examiner of the district in which the person is employed. The latter will as soon thereafter as possible make the necessary inquiries of the applicant, and medical examination when such is required, advise the proper employing officer and the applicant of the result, and, if it is favorable, complete and forward the application.

26. Applications shall take effect at their dates, excepting as to persons not on duty, in which cases they will take effect at any subsequent dates upon which the applicants go on duty.

27. An application may be dated upon any date in the month next following that in which it is signed, if the applicant desires it to take effect upon such date.

28. An applicant may, in his application or subsequently, designate a beneficiary to receive his death benefit other than relatives entitled to recover the amount payable in the event of the death

of the applicant, on giving good and sufficient reasons for such designation.

29. (As amended.) Benefit payable on account of the death of a member, shall be payable only to the beneficiary or beneficiaries designated in his application to receive the same, if living at the death of said member. If the designated beneficiary shall not be living at the death of said member, then the benefit shall be payable to the wife (or husband), or in the event of the applicant at death having no wife (or husband) living, then to the children of the member collectively, each to be entitled to an equal share, including, as entitled to the parent's share, the issue of any deceased child, or if there be no children or such issue living, then to the father and mother of the deceased member jointly or the survivor, or if neither of these be living, then to the next of kin if there be any such, payment in behalf of such next of kin to be made to the legal representatives of the deceased member.

If there be no relatives living, the benefits otherwise payable shall lapse and the amount thereof shall remain as a part of the relief fund, without claim for the same, and the necessary funeral expenses and proper expenses incident to the disability and death of the deceased member, shall, in such case, be paid from the fund.

30. Unless otherwise directed by the Superintendent of the relief department, an application of a married woman must be signed also by her husband, and that of a minor by the father or other legal guardian.

CONTRIBUTIONS.

31. The word "contribution," wherever used in the regulations, or in the organization adopted in connection therewith, shall be held and construed to refer to such designated portion of the wages payable by the Company to an employe as he shall assent to receiving through the right which he shall derive to benefits by the instrumentality of the relief fund, and the words "contributors," "contributing employes" and like words and phrases are descriptive of employes giving such assent.

32. Contributions shall be made monthly in advance, at the following rates. For the first class, seventy-five (75) cents per month; for the second class, twice as much (\$1.50); for the third class, three times as much (\$2.25); for the fourth class, four times as much (\$3.00); and for the fifth class, five times as much as for the first (\$3.75).

33. The contribution for part of a month shall be a proportional part of the amount for a whole month, and an amount to be col-

lected or refunded for part of a month shall be estimated at one-thirtieth part of the amount for the whole month, for each day, adding to make even cents where fractions occur. The time for which such estimate is made shall include the date upon which an application takes effect or a member goes on duty after absence, and shall exclude all after the date upon which membership ceases.

34. The rates per month of contributions for death benefit only, additional to the death benefit of a member's class, shall be as follows :—

For a member not over forty-five (45) years of age, thirty (30) cents ; over forty-five (45) and not over sixty (60) years, forty-five (45) cents ; and over sixty years of age, sixty (60) cents. If a member shall have taken any additional death benefit and shall increase the amount after his age requires a higher rate than he before contributed the higher rate shall apply only to the increase.

35. Contribution for a whole month will be due on the first day of such month. It will ordinarily be deducted from the gross amount of the member's wages on the pay roll of the preceding month and placed to his credit in the relief fund.

36. (As amended.) When an application is to take effect upon the first day of a month, the contribution for that month shall be made on the roll of the preceding month, if the application is received by the 25th of the latter month. In other cases the contribution for a month or any unexpired part of a month in which an application takes effect or a member goes on duty after absence, shall be made on the roll of that month, together with the contribution for the next month.

If absence is from disablement and the member shall recover in a month for which he has not contributed, he shall not contribute for the remainder of that month, but will be entitled to benefits for disablement or death occurring during such month.

After recovery from disablement, contribution for the whole of the next month, when not otherwise paid, shall be deducted from wages earned or benefits payable ; and if the recovered member, by reason of furlough or suspension, does not return to duty until after the first of the month following recovery, he shall nevertheless be entitled to benefits for disablement or death occurring at any time in that month, but not for that occurring in any succeeding month for which he shall not have contributed in advance.

37. (As amended.) A member who for other reasons than disability, earns no wages in a month, for which his contribution may be made, shall not be entitled to benefits in the next month, unless he shall have otherwise made the proper contribution in advance.

Such contribution made after the 1st day of the month for which it is intended shall be only for the remaining part of the month, including the date on which it is paid, and shall not entitle to benefits for disablement or death occurring prior to that date.

38. When a member is disabled or dies in the month in which his application takes effect, his contribution for that month will be deducted from the wages earned therein or from the benefits payable if the wages are not sufficient, and the amount of contribution shall be for the unexpired part of the month, commencing with the date upon which the application takes effect.

39. A member shall not make contribution for any time during which he is entitled to disablement benefits, after the month in which the disability begins. When wages are paid during disability the usual contribution will be made.

40. No contribution is to be deducted from the final payment of wages to a member leaving the service, except for contributions in arrears, and there shall be returned to him so much of his last contribution as covers the part of the month succeeding the date on which he leaves the service, for which he must give a receipt in the prescribed form. When the amount cannot be otherwise learned, it will be ascertained from the Superintendent of the Relief Department.

41. No part of the contribution of a member will be refunded in the event of his death.

42. (As amended.) Members will be entitled to the following benefits :—

First. Payments while disabled by accident in the Company's service, for each day during a period not longer than fifty-two (52) weeks, at the rate of fifty (50) cents per day for a member of the first class, and of greater amounts for members of the other classes, in proportion to their contributions ; and at half these rates after fifty-two (52) weeks and during the continuance of the disability.

Second. Payments while disabled by sickness or by injury other than accident in the Company's service, for each day after the first three (3) days of such disability, and for a period not longer than fifty-two (52) weeks, at the rate of forty (40) cents per day for a member of the first class, and of greater amounts for the other classes, in proportion to their contributions, provided that if upon the decision of the Medical Examiner, a member shall have returned to duty after disability from sickness, and shall again be disabled by sickness within less than two (2) weeks from his return to duty, such disablement shall be counted with the prior one in computing

the fifty-two (52) weeks for which payments may be made, and the deduction of three (3) days shall not be made therefrom.

A member, after receiving for fifty-two (52) weeks the payments herein provided for, shall, by contributing for the death benefit, retain the title to payments in the event of death occurring while continuing disabled and unable to engage in any occupation. In such case the contribution for each death benefit of the first class to which the member's class entitles him shall be at the rate in Regulation 34 applicable to the age at which he entered the class in which he last contributed, and for his additional death benefit at the rate he last contributed for the same. If such member shall be declared by the Medical Examiner able to return to duty, and shall so return and resume full contribution, he shall be entitled to payments for disablement by accident occurring thereafter in the Company's service, and to payments for disablement by sickness occurring after he shall have been continuously engaged in the performance of duty for a period of four weeks.

Third. A payment, upon the conditions prescribed in the Regulations, on the death of a member from accident or other cause, occurring during time for which he shall have contributed, or while receiving disablement benefits, or during a month in which he shall have recovered from disability, of two hundred and fifty dollars (\$250) for a member of the first class, and of greater amounts for the other classes, in proportion to their contributions.

Fourth. Provision for necessary surgical attendance during disability from accident occurring to members while in the discharge of duty as employees of the Company.

43. (As amended.) The following table exhibits the amounts of the contributions and benefits of the several classes :

	1st CLASS.	2d CLASS.	3d CLASS.	4th CLASS.	5th CLASS. OVER
Highest monthly pay for each class.....	\$ 40.00	\$ 60.00	\$ 80.00	\$ 100.00	\$ 100.00
Rates of contribution per month .....	.75	1.50	2.25	3.00	3.75
Accident benefits per day :					
First fifty-two weeks.	.50	1.00	1.50	2.00	2.50
After fifty-two weeks	.25	.50	.75	1.00	1.25
Sick benefits per day not including first <i>three</i> days, and not longer than fifty-two weeks.....	.40	.80	1.20	1.60	2.00
Payments in the event of death.....	250.00	500.00	750.00	1000.00	1250.00

44. Benefits and other claims upon the relief fund, shall be paid out in conformity with the financial methods of the Company and on orders of the Superintendent of the relief department, upon his receiving satisfactory certificates respecting the claims from the Medical Examiners and other proper officers.

45. Payments on account of disablement by accident will only be made upon the disablement being shown to have resulted solely from accidents occurring to members in the performance of duty in the service of the Company, to which they were assigned, or which they were directed to perform, by proper authority or in voluntarily protecting the Company's property. This shall include accidents occurring to members at points upon the Company's property which they are required to pass, when going to or from work, and which do not result from their voluntarily or unnecessarily exposing themselves to danger. There must be exterior or other positive evidence of injury, and satisfactory evidence that it renders the person totally unable to labor, or, when of a permanent character, to earn a livelihood in an employment suited to his capacity. Disablement from accident occurring otherwise than as aforesaid, will be classed with sickness.

Questions as to the permanent character of disability and the continued payment of benefits on account of the same, shall be determined by the Advisory Committee.

46. If a member of the relief fund who has recovered from disability from accident in the Company's service, shall continue disabled from sickness or debility, he shall be entitled to sick benefit to a date not later than that to which he would have been entitled thereto if the whole of the disability had been from sickness, and at corresponding rate.

47. If a member of the relief fund shall die during disablement from accident or sickness, the death benefit which may be payable shall not be subject to deduction of previous payments of disablement benefits.

48. A member of the relief fund shall be entitled to benefits in the event of disablement or death during the time intervening between the first of the month and payment of his wages, and also from the date his application takes effect, and from any date upon which, after absence, he returns to duty in a month for which he has not contributed, notwithstanding the fact that his contribution shall not be actually made until the payment of wages from which it is to be deducted.

49. An employe entitled to become a member, who shall have

applied for membership, shall not be debarred from receipt of benefits for disablement or death from accident in the service, because of his application not having been approved, if before medical examination, or during the consideration of his application, an accident shall occur to him in the discharge of his duty as employe. The same rule shall be applicable as to other than accident benefits for any one who shall have passed a satisfactory medical examination, and in whose case there are no circumstances warranting the rejection of his application, and who shall meet with disablement or death before his application shall have been formally approved. In such cases contributions previously made, will be retained, or the proper amounts will be deducted from wages earned, or from benefits payable if the wages payable be not sufficient. In other cases contributions made by those whose applications are not approved will be refunded.

50. Unless specially otherwise arranged with the Superintendent of the relief department, benefits will not be paid on account of accident, sickness or death, occurring at any place beyond the jurisdiction of the United States, or on account of sickness or death, occurring to a member from epidemic disease of a dangerous character, at any place where such disease is known to prevail, and to which his duties as an employe in the Company's service, or in his family relations, do not require him to go, and contributions will be refunded which cover any time subsequent to the date upon which members, though on furlough, may go to such places.

51. Members will not be entitled to receive disablement benefits for time for which wages are paid them by the Company. In computing benefits, the time of disablement shall be taken as commencing upon the first day of the disablement upon which a full day's wages are not paid.

52. Benefits will not be paid for disability arising from sickness contracted and injuries received by members while intoxicated or off duty in consequence of intoxication, or from injuries received while engaged in unlawful acts ; or for disease or death resulting from their immoralities or from the intemperate use of stimulants or narcotics or for death by the hands of justice.

53. Benefits on account of continued disability will be paid monthly. When the amounts payable at the end of a month can be ascertained by the fifth of the succeeding month they will be paid not later than the twentieth of that month. Benefits for shorter periods of disablement will be paid at once on the amounts being ascertained.

54. (As amended.) Claims for death benefits will be payable within thirty days after the required evidence is furnished of their validity.

A part may be paid before the final settlement, to meet funeral or other urgent expenses incident to the death of a member ; provided that any such payment without the written authority of the persons to whom the death benefit is payable, shall not exceed the sum of sixty dollars for funeral expenses alone, nor the sum of one hundred dollars for funeral and other expenses ; unless the whole or part of the persons to whom the death benefit is payable cannot be found, or are in a foreign country or at points so distant that they cannot be conveniently communicated with, or there are no such persons living ; in which cases the Superintendent of the relief department may make such payments, as a part of the death benefit as in his judgment may be reasonable, for the proper burial of the deceased member and the payment of expenses necessarily incident to his death or disablement prior to death.

55. Benefits payable on account of disablement of a member by accident or sickness shall be payable only to the disabled member. Any such benefits remaining unpaid at the death of a member shall be paid to the person or persons entitled to receive the death benefit.

56. Members shall not be entitled to benefits who shall decline to permit the Medical Examiners to ascertain their condition while disabled, or who shall at such times absent themselves from home and shall be in places so distant that the Medical Examiners cannot be expected to visit them, unless satisfactory statements as to their condition shall be furnished by them, from reputable attending physicians.

MISCELLANEOUS.

57. Freight and passenger agents will cash orders for claims upon the relief fund, excepting for death benefits, when the funds of the Company in their hands will permit, and use the same as vouchers in settlement with the accounting department.

For contributions returned, receipts must be taken in the prescribed form and sent to the Superintendent of the relief department, who shall prepare a voucher for the same in favor of the officer paying them.

Death benefits will be paid by vouchers, which will be cashed by the Treasurer or designated depositories of the Company.

58. Should a member or his legal representative bring suit against the Company, or against any other corporation which

may be at the time associated therewith in administration of the relief departments, in accordance with the terms set forth in Regulation No. 6, for damages on account of injury or death of such member, payment of benefits from the relief fund, on account of the same, shall not be made, until such suit is discontinued. If prosecuted to judgment or compromised, any payment of judgment or amount in compromise shall preclude any claim upon the relief fund for such injury or death.

59. The Superintendent of the relief department and the Medical Examiners are to be informed at once, in the manner provided, of accidents or sickness occurring to members.

60. Members who shall be absent from duty on account of sickness or injury must at once notify the person who keeps the record of their time, and they will not be entitled to benefits for time previous to such notice, unless the delay shall have been unavoidable and the reason is stated.

61. Members must keep their foremen or time-keepers informed of their addresses and of any changes of the same.

62. The responsibility of the relief department to any member shall end when he ceases to be employed by the Company, excepting for benefits to the payment of which he shall have become previously entitled by reason of accident or sickness occurring while in the service.

63. When a member leaves the service he must surrender his certificate of membership to the person from whom he receives his final payment of wages.

64. The office of the Superintendent of the relief department, with the records thereof, shall be located at such point as shall from time to time be designated by the General Manager, either upon the lines of railroad owned or operated by the Company, or upon lines of railroad owned or operated by any Company with which it may become associated in the administration of the relief department.

65. All questions or controversies of whatsoever character arising in any manner, or between any parties or persons in connection with the relief department, or the operation thereof, whether as to the construction of language or meaning of the regulations of the relief department, or as to any writing, decision, instruction or acts in connection therewith, shall be submitted to the determination of the Superintendent of the relief department, whose decision shall be final and conclusive thereof, subject to the right of appeal to the Advisory Committee within thirty days after notice to the parties interested, of the decision.

When an appeal is taken to the Advisory Committee it shall be heard by said Committee without further notice at their next stated meeting, or at such future meeting or time as they may designate, and shall be determined by vote of the majority of a quorum, or of any other number not less than a quorum of the members present at such meeting, and the decision arrived at thereon by the Advisory Committee shall be final and conclusive upon all parties without exception or appeal.

STATISTICS.

THIRD ANNUAL REPORT.

A report of the operations and financial condition of the Relief Fund for the fiscal year ending December 31st, 1888:

Balance on hand December 31st, 1887,	\$192,157 56
Contributions from members and Companies for year 1888.....	\$349,757 83
Interest on monthly balances.....	<u>8,739 24</u>
Receipts, year 1888.....	358,497 07
Total	\$550,654 63
Benefits paid members during year 1888	<u>283,512 10</u>
Balance December 31st, 1888.....	\$267,142 53
Add amount due from the Baltimore & Potomac R. R. Co. for deficiency in the Relief Fund of that Company, as the result of the operations for the period of three years, ending December 31st, 1888.....	256 18
	<u>\$267,398 71</u>

From which deduct as follows:—

Unpaid Benefit Orders—	
Cases of 1886.....	\$ 24 90
Cases of 1887.....	401 00
Cases of 1888.....	<u>13,559 64</u>
	\$13,985 54
Unpaid Death Benefits—	
Cases of 1886.....	\$1,708 91
Cases of 1887.....	629 50
Cases of 1888.....	<u>4,375 00</u>
	6,713 41
	<u>\$20,698 95</u>

Estimated Disablement liabilities—

Cases of 1886.....	\$794 70
Cases of 1887.....	2,179 01
Cases of 1888.....	<u>48,811 61</u>
	\$51,785 32

Reserve for increasing ages of members 24,126 20

75,911 52

Estimated net surplus, Dec. 31st, 1888.

96,610 47
\$170,788 24

The number of payments and the amount of benefits paid under the several features during the past year, and for the period since the commencement of the department are shown in the following table:—

BENEFITS PAID FROM FEBRUARY 15TH, 1886.

	FEBRUARY 15TH, 1886, TO DECEMBER 31ST. 1886.		JANUARY 1ST, 1887, TO DECEMBER 31ST, 1887.		JANUARY 1ST, 1888, TO DECEMBER 31ST, 1888.		FEBRUARY 15TH, 1886, TO DECEMBER 31ST, 1888.		Average per Payment.
	No. of Payments.	Amounts paid.	No. of Payments.	Amount paid.	No. of Payments.	Amount paid.	No. of Payments.	Amount paid.	
Deaths from accident.....	32	\$18,300.00	49	\$27,956.00	53	\$30,000.00	134	\$76,256.00	569.07
“ “ natural causes.	116	79,321.27	198	106,395.98	197	100,819.34	511	286,536.59	560.73
Disablement from accidents.	1,744	17,664.60	3,186	44,122.10	3,849	50,098.80	8,779	111,885.50	12.74
“ “ natural causes	3,653	35,862.00	7,186	86,131.70	7,815	102,593.96	18,654	224,587.66	12.04
Total	5,545	\$151,147.87	10,619	\$264,605.78	11,914	\$283,512.10	28,078	\$699,265.75	

The auditors' report shows a balance to the credit of the fund of \$246,443.58, while the financial statement shows it as estimated at \$170,788.24, a difference of \$75,655.34. In the auditors' report there are deducted only those liabilities (\$20,698.95) the amounts of which are actually known; while in the financial statement there is an additional deduction of estimated liabilities representing payments yet to be made for existing disablement cases (\$51,785.32), and the amount set aside for increasing ages of members (\$24,126.20). These, added together, make a total of \$75,911.52. Deduct from this the amount (\$256.18) due from the Baltimore & Potomac Railroad Company, and the result is \$75,655.34, the difference stated.

The operating expenses of the department, paid by the companies, were:—

For the year 1886.....	\$54,509.08
" " " 1887.....	56,701.38
" " " 1888.....	55,901.50
Total.....	<u>\$167,111.96</u>

It will be seen, therefore, that if the operating expenses had been a charge upon the fund, instead of being paid by the companies, the surplus (after including the amount \$256.18 before referred to as due from the Baltimore & Potomac Railroad Company), instead of being \$170,788.24, would have been but \$3,676.28.

The whole amount of payments by the companies thus far have been:—

Operating expenses as above.....	\$167,111.96
Contributions for members in February, March and April, 1886.....	60,652.86
Additional relief in 1887 and 1888 to members who had exhausted their title to sick benefits, as hereinafter stated:.....	10,080.20
Total.....	<u>\$237,845.02</u>

The accessions to membership during 1888 averaged over 175 per month, and exceeded the deaths and withdrawals by 1634. The number of members leaving the service was 1046, making a net gain in membership of 588 during the year.

The average monthly membership for the year was 19,068.

The death rate during the year was equal to twelve and six-tenths per thousand members, and the average number of members

constantly disabled was equal to thirty-one per thousand members.

Those members who, by the amendment to Regulation 42, in effect since October 1st, 1887, were permitted to keep up their title to death benefit after ceasing to be entitled to disablement benefits, have all availed themselves of the privilege. Under the provisions for continued payments by the companies to these members, there has been paid, since that date, to one hundred and ten persons the sum of \$10,080.20.

Regulation No. 10 provides that at the end of three years—that is, at the end of 1888—the question of a superannuation fund shall be considered, provided there be a surplus sufficient to make such a plan possible. The surplus January 1st, 1889, was over \$170,000, and it is now announced that the Advisory Committee will before long promulgate a plan for a regular system of pensions for superannuated members of the relief fund. As is shown above the surplus of this department is just about equal to the amount paid for running expenses during its three years' existence, and that this amount has come wholly from the treasury of the railroad company. In other words, the assessments are placed at such a rate that they would have just fairly sustained the institution. The interest on \$170,000 at four per cent. is \$6,800 per year, sufficient to pay, say, 20 pensions of about \$30 per month each.

§ 9. New York and Northern Employees' Mutual Benefit Association.—

CONSTITUTION.

ART. I.—OBJECT. The object of the association is to properly care for its members, as far as lies in its power, in time of disability and sickness, when such disability and sickness is not a result of intemperance.

ART. II.—MEMBERSHIP. Any employe or officer of the New York City and Northern Railroad may become a member of the Association.

ART. III.—OFFICERS. The Association shall be under the control of a Board of Managers, consisting of a President, Vice-President, Treasurer, Secretary, Corresponding Secretary, and an Executive Committee of three (3) who shall be nominated and elected by the Association, all of whom shall serve faithfully and

to the best of their ability, without pecuniary compensation. Upon the retirement of any member from the Board of Managers, a successor shall be nominated and elected by said board to fill the unexpired time.

A person to be eligible to office or membership must be an employe of the road.

ART. IV.—ELECTIONS. During the first week in December of each year the members of the Association shall elect their officers.

Members of the Association will send to the Board of Managers, in writing, the vote they wish to cast. Such vote shall be on record for their inspection at High Bridge.

ART. V.—MEETINGS. At the first yearly meeting the old board shall make a detailed statement to the Association of expenditures and work done during the year, and retire from office, and the new board organize.

The Board of Managers shall be empowered to make such laws and regulations in conformity with the constitution and by-laws for conducting the business of the Association as they may deem proper.

The Board of Managers shall meet on the last Monday of each month, for exchange of views in relation to the affairs of the Association, and such other matters as may need their attention. Five (5) shall constitute a quorum.

These meetings shall be open to any member of the organization.

ART. VI.—QUESTIONS OF IMPORTANCE. All questions of importance shall be decided by a majority vote of the Association.

No question will be considered important unless it is presented to the Board of Managers in writing with the signatures of twenty (20) members.

ART. VII.—ASSESSMENTS. The regular assessment shall be 50 cents per month. At the death of a member, a special assessment of 50 cents shall be made.

If the funds of the Association are inadequate to meet its liabilities, two extra assessments per year of 50 cents each may be made upon special report of the Treasurer, showing the necessity for such action.

Any member refusing to pay the assessments shall be stricken from the roll at once, and shall forfeit all rights in the Association.

ART. VIII.—BENEFITS.—I. No member shall receive more than ten (10) weekly allowances on account of sickness or injury

in any one year, excepting those who may be injured while on duty, but may at all times have medical attendance when necessary.

II. There shall be no allowance made for loss of time during the first week of sickness or disability, unless it be caused by injury received while on duty.

III. The weekly allowance shall be five (5) dollars.

IV. In cases of severe injury, received while on duty, when the service of a surgical nurse is required, the Association will provide such nurse.

V. The Association shall provide medical and surgical attendance.

VI. The whole amount collected on account of a death assessment shall be paid to the nearest of kin of deceased member, or whoever said member may have designated.

ART. IX. TREASURER.—The Treasurer shall pay no moneys nor recognize any orders or claims to or from any party or parties except the Executive Committee approved by the President. All claims must be audited by said Committee and bear their signatures.

ART. X.—EXECUTIVE COMMITTEE. The Executive Committee, on their first yearly meeting, must organize by electing a Chairman, who will be the responsible head of said committee. They shall be empowered to make such rules and regulations, for the proper management of their business, as they may deem proper, providing, however, said rules and regulations do not conflict with the constitution and by-laws.

The Executive Committee shall nominate for appointment a reputable physician, thoroughly versed in medicine and surgery, as surgeon for the Association, which appointment shall be conferred only upon a majority of vote of the board in full session; the term of which office shall be one year from date of appointment.

The duties of the Executive Committee shall be:

1. To audit and pass all accounts.
2. To act upon all claims against the Association.
3. To settle all disputes regarding doubtful assessments and allowances.
4. To see that the sick and injured are properly cared for.
5. To act as the medium between the Board of Managers and the members.
6. To see that all property belonging to the organization is

properly cared for, and that members are not deprived of its use.

ART. XI.—**SPECIAL MEETINGS.** Special meetings of the Board of Managers may be called by the President or Secretary, as exigencies may necessitate, upon written request of three members of the board to the President, who shall convene the board within five days from the date of said request.

ART. XII.—**AMENDMENTS AND SUBSTITUTIONS.** The constitution and the following by-laws may be amended or repealed, and new ones substituted by a majority vote of the members of the Association.

BY-LAWS.

I. The Board of Managers shall not have a vote at the annual election.

II. The Board of Managers shall act as a Board of Canvassers at the annual election.

III. In the case of a tie between any two candidates the Board of Managers can decide by ballot.

IV. Application for membership must be sent to the Secretary.

V. Every person ceases to be a member when he leaves the service of the road.

VI. Every member who shall be unable to perform his duties by reason of sickness or injury shall immediately inform the Executive Committee. The Association is bound to the payment of allowances only when the disablement is thus reported, and no claim that has not been so reported will be considered.

Allowances will in no case antedate such notification.

Every member having control of men shall notify the Secretary of the Association, with the utmost promptness, each case of sickness or injury occurring among his men who are members.

VII. It is the duty of the Association's Surgeon to decide when a member is unfit for duty and the payment of the weekly allowance will be made upon his report. No allowance will be paid a member after the date fixed by the Surgeon for his return to duty, unless unforeseen circumstances render it clearly impracticable for him to obey the direction, which must be clearly shown before further payment will be made.

VIII. The Executive Committee will recognize no bills or obligations contracted with any physician or surgeon other than their authorized representative, except as provided for in Article IX.

In all cases it shall require the Association's Surgeon's certificate,

endorsed by the Executive Committee and approved by the President, to entitle a member to the weekly benefit.

IX. Members injured while on duty have the right to call in the nearest surgeon to attend them in an emergency, and until the Association's Surgeon can take charge of their case, but no operation is to be permitted, except to save life, without the consent of the Association's Surgeon.

X. Those who have forfeited their membership may be reinstated at any regular meeting by a majority vote of the Board of Managers by giving sufficient guarantee that all future assessments shall be paid promptly.

§10. Burlington Voluntary Relief Department.

This department has been organized by the directors of the Chicago, Burlington & Quincy Railroad Company and associated roads for the benefit of the 30,000 employes of the system, enabling them to make provision for themselves and families in case of accident at any time whether on or off duty and against sickness and death from natural causes. The system is similar to the Pennsylvania Railroad Relief Department. Membership is voluntary, no employe being required to join the association, and any member can withdraw from the department at the end of any month. Offices will be furnished by the Burlington system, which will also donate the services of its clerks, pay for printing, stationary, salaries of its clerks, medical examiners and all incidentals. In short it will defray all the operating expenses of the department which will amount to some \$60,000 a year. The Company will take charge of the funds, guaranteeing their safe keeping and proper disbursement, beside paying interest on monthly balances in its hands at the rate of 4 per cent. per annum. It will also guarantee the payment of benefits so that in case of contributions of members are not sufficient to meet the disbursements the Company will advance the money for the payment of benefits as they become due. At the end of three years if any deficiency shall exist it will be supplied by the Company. For the first six months employes will be admitted to membership without regard to age and without passing a medical examination. After the first six months, however, no employe over 45 years of age will be admitted, and each applicant will have to pass a satisfactory medical examination. Employes are divided into five classes, as follows: Those receiving wages of \$40 per month or less, those receiving over \$40 and under \$60, those receiving from \$60 to \$80, those receiving from \$80 to \$100 and

those receiving \$100 or more. The contributions vary from 75 cts. to \$3.75 a month, according to the class. The regular monthly contribution is all that any member is required to pay, there being no assessment and no charge for admission, initiation, certificate, medical examination, etc. The benefits which members are entitled to receive vary from 50 cents to \$2.50 per day, according to class. In case of accident in the service the member is entitled to benefits at full rates for fifty-two weeks during disability and at half rates thereafter, and receives surgical attendance as long as necessary. In case of accident while off duty the injured member is entitled to receive the full rate for fifty-two weeks. The death benefits vary from \$250 to \$1,250. In case of sickness or accident terminating fatally, the death benefit is paid in full, no deduction being made for benefits paid during sickness or disability during accident.

§ 11. Brown and Sharpe Mutual Relief Association.—

This Association, composed of the employes of the Brown and Sharpe Manufacturing Co., Providence, R. I., was organized for the purpose of rendering temporary assistance to its members, when through sickness or injury they are unable to work. There are no death benefits. The Association was organized September 10th, 1886, and the result up to January 1st, 1889, shows the wisdom of its founders. On the above date the membership was 307. The Association has paid in benefits to its members \$1477.

CONSTITUTION.

ART. I.—SEC. 1. The name of this Association shall be the Brown and Sharpe Mutual Relief Association.

ART. II.—SEC. 1. The object of this Association shall be the mutual relief of its members in case of sickness or other infirmities which unfit them for their daily labor.

ART. III.—SEC. 1. The regular meeting of this Association shall be held annually on the second Tuesday of January.

SEC. 2. Twenty members shall constitute a quorum for the transaction of business.

ART. IV.—SEC. 1. The officers of this Association shall consist of a President, Vice-President, Secretary, Treasurer and a Board of five Directors.

SEC. 2. All officers shall be elected by ballot at the annual meeting, to hold office for one year or until their successors have been chosen.

ART. V.—SEC. 1. The President shall preside at all meetings, call special meetings at the request of a majority of the Board of Directors, or at the written request of eleven members of the Association. He shall sign all orders on the Treasurer for money. Upon receiving notice from the Secretary of the sickness of a member he shall at once appoint a Visiting Committee, whose duty it shall be to visit the sick member as soon as possible thereafter, and report his condition to the President. The President shall enforce all rules of the Association, and perform such other duties as may be required.

SEC. 2. The Vice-President shall perform the duties of the President, in the absence of the latter.

SEC. 3. The Secretary shall keep and preserve all records, collect and deliver to the Treasurer all money due the Association, taking a receipt therefor, issue notices of meetings, and perform such other duties as the office may require.

SEC. 4. The Treasurer shall receive and hold money belonging to the Association, and shall pay it out only upon orders signed by the President and three Directors. It shall be his duty to invest the funds of the Association, subject to the approval of the Directors, to make a quarterly report, and post the same in a conspicuous place in the works.

SEC. 5. The Directors with the President, shall have general supervision of the affairs of the Association. They shall decide who are entitled to benefits, and shall audit all books and reports.

SEC. 6. The Directors with the President, shall have power at such times as in their judgment is just and necessary, to levy an assessment on the members of the Association to meet the contingencies of excessive sickness or accidents, provided, 1st, That such assessment shall not exceed fifty cents for first class, and twenty-five cents for second class members, nor shall such assessment be levied more than twice in one year. 2d. Further assessments may be levied by a two-thirds vote of the members present at any regular or special meeting.

ART. VI.—SEC. 1. Any person in the employ of the Brown and Sharpe Manufacturing Co. shall be eligible to membership in this Association upon application to the Secretary and payment of the sum of fifty cents for admission to the first class, or twenty-five cents for admission to the second class.

SEC. 2. Connection with this Association shall cease when a member shall have left the employ of Brown and Sharpe Manufacturing Co.

ART. VII.—SEC. 1. The funds of this Association shall consist of the admission fees, assessments, and weekly dues of members.

ART. VIII.—SEC. 1. The membership shall be divided into two classes: The first class to consist of those whose weekly pay is \$8.00 or more, and the second class of those whose pay is less than \$8.00 per week.

SEC. 2. The dues in the first class shall be 5 cents per week, and in the second class 2½ cents per week, to be collected by the Secretary every four weeks.

ART. IX.—SEC. 1. Any member of the Association unable to attend to his duties through sickness or other disability, must notify the Secretary at once of the date of such sickness or disability, and at the expiration of one week from such date shall be entitled to receive from the Association if he be a member of the first class, \$1.00 per day, and if of the second class, 50 cents per day for every ensuing day of sickness, (Sundays excepted) for a period not exceeding thirteen weeks.

SEC. 2. Any member failing to notify the Secretary within one week from date of commencement of sickness or disability, shall not be entitled to benefits until the expiration of one week from date of such notice.

SEC. 3. No member shall be entitled to benefits until he or she has been a member of the Association four weeks.

SEC. 4. Any member having become entitled to benefits, and having drawn the same, and returned to work, and being again taken sick within a period of less than four weeks, such second sickness shall be considered as a continuation of the first sickness and the member shall only be entitled to benefits for such a number of days as added to the previous term of sickness shall make thirteen weeks, unless the Directors and President shall decide to the contrary.

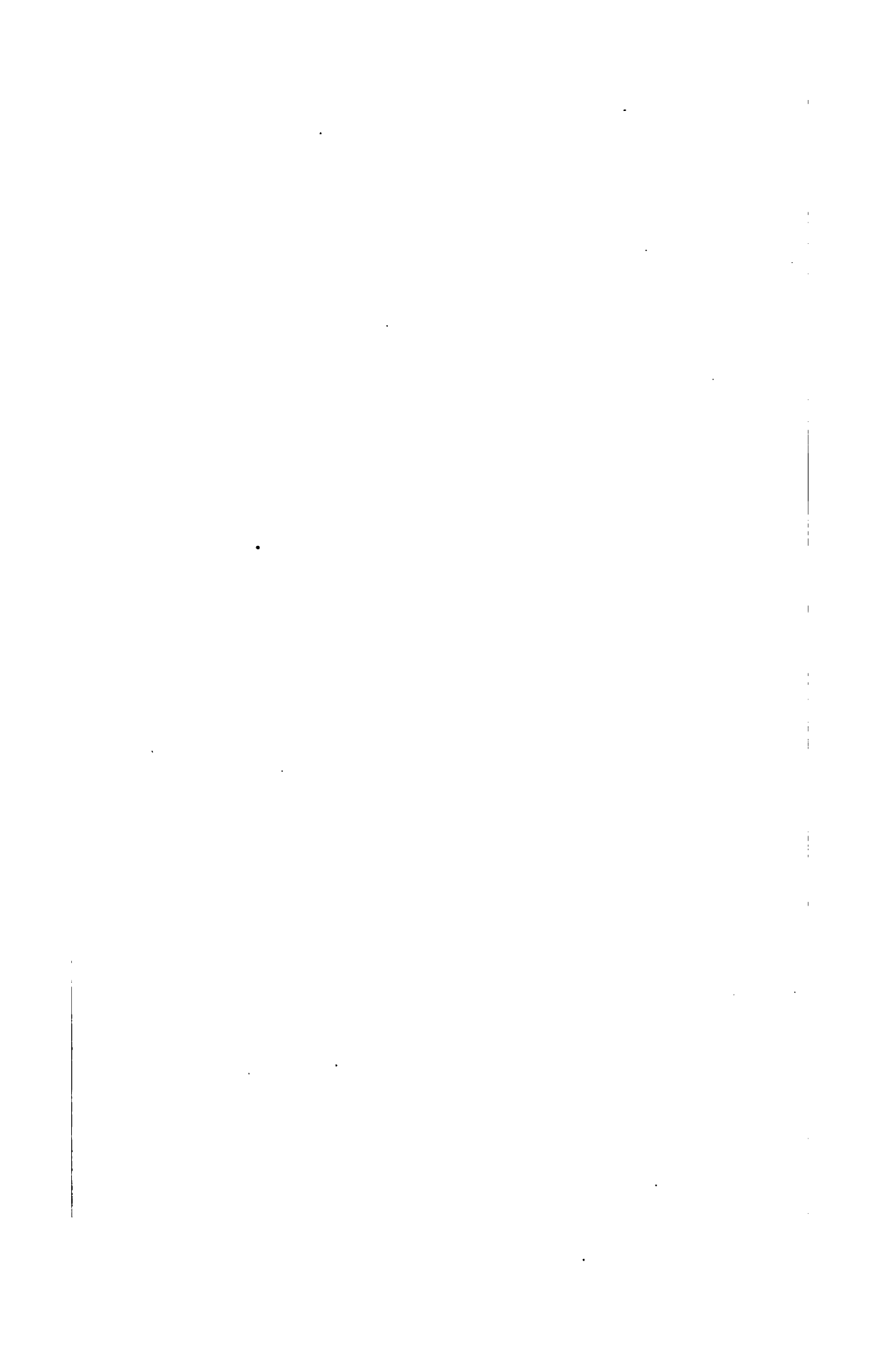
SEC. 5. Any member having drawn benefits for the full term of thirteen weeks, shall not be entitled to further benefits until they shall have been at work for a period of not less than four weeks.

SEC. 6. No benefit shall be paid for any sickness or disability arising from intemperance or any immoral act on the part of any member.

ART. X.—SEC. 1. Whenever the funds of this Association shall reach the sum of \$300.00, the Board of Directors shall cause the collection of weekly dues to be suspended until said funds in the hands of the Treasurer shall fall below the sum of \$200.00, when said Board of Directors shall cause the collection to be resumed.

ART. XI.—SEC. 1. The Constitution and special rules of this Association may be amended or repealed at any annual or special meeting by a two-thirds vote of all the members present at such meeting, provided, however, that notice of such intended action has been given to the Secretary, and inserted in the call for the meeting.

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